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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1346

THE STATE OF MINNESOTA, APPELLANT,

vs.

HENRY E. BARBER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 14, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 25, 1889.

1 United States Circuit Court, District of Minnesota.

Pleas before the honorable the judges of the United States circuit court of America for the district of Minnesota, of the June term of said court, held in the city of St. Paul, in said district, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the 113th year.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus.*

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 16th day of September, A. D. 1889, came the petitioner above named, by W. H. Sanborn, Esq., his solicitor and of counsel, and filed in the clerk's office of said court his petition for a writ of *habeas corpus;* which said petition and order allowing same are in the words and figures as follows, to wit:

Petition for Writ of Habeas Corpus.

2 UNITED STATES OF AMERICA, *District of Minnesota,* } *ss:*

In the United States Circuit Court, Eighth Judicial Circuit.

To the honorable the judges of said court:

Your petitioner, Henry E. Barber, represents that he is unlawfully restrained of his liberty by Edwin S. Bean, sheriff and keeper of the common jail of Ramsey county, in the State of Minnesota, at the city of Saint Paul, in said State.

The pretended cause of restraint is as follows:

On the 16th day of Sept., A. D. 1889, one Reuben Clewett filed with William Clark, a justice of the peace in and for the town of White Bear, county of Ramsey and State of Minnesota, an affidavit and complaint in the words following, to wit:

"STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

In Justice Court, before William Clark, Justice of the Peace in and for said County.

Reuben Clewett, being duly sworn, makes complaint to the above-named justice of the peace, and says that on the 16th day of Sept., A. D. 1889, at the town of White Bear, in the county of Ramsey and State of Minnesota, one Henry E. Barber, then and there being —, did wrongfully and unlawfully offer and expose for sale and did sell for human food a certain quantity, to wit, one hundred pounds, of fresh uncured beef, which said beef was then and there a part of an animal which had been slaughtered in the State of Illinois, and which

animal had not been inspected and certified before slaughter by an inspector appointed under the laws of the State of Minnesota; that at the time and place aforesaid when said Henry E. Barber offered and sold said beef as aforesaid he then and there intended the same for consumption as human food in the town of White Bear and said county of Ramsey, and then and there knew that the animal aforesaid had not been inspected alive, as provided by law.

And he further says that at the time and place aforesaid, in and for said town of White Bear and in and for the said county of Ramsey, proper inspectors had been duly appointed and qualified by law.

And that said Henry E. Barber then and there unlawfully and knowingly offered for sale and sold said beef, in violation of and contrary to the statute in such case made and provided and against the peace and dignity of the State of Minnesota.

Wherefore the complainant prays that said Henry E. Barber may be arrested and dealt with according to law.

(Signed) REUBEN CLEWETT.

Subscribed and sworn to and complained of before me, at said town of White Bear, Ramsey county, Minnesota, this 16th day of Sept., A. D. 1889.

(Signed) WILLIAM CLARK,
Justice of the Peace."

And thereupon said justice of the peace issued a warrant for the arrest of your petitioner, and caused the same to be delivered to Reuben Clewett, a deputy sheriff of said Ramsey county, to be executed.

That, pursuant to the command of said warrant, said officer arrested your petitioner and brought him before said justice of the peace for trial upon the charge set out in said affidavit and complaint; that thereupon said justice of the peace, after hearing the evidence adduced against your petitioner regarding the accusation contained in said affidavit and complaint, adjudged your petitioner guilty of the alleged offense therein charged, and that he should be committed for thirty days and confined in the common jail of said Ramsey county.

Your petitioner further shows that thereupon said justice of the peace issued a writ of commitment to Edwin S. Bean, the sheriff and keeper of the common jail of Ramsey county, commanding that officer to take and confine him, your petitioner, for the period of thirty days in the common jail of said Ramsey county; that by virtue of said mittimus said Edwin S. Bean seized the person of your petitioner, holds him in custody, and is about to confine him, your petitioner, in the jail aforesaid in obedience to the command of said writ.

That the affidavit and complaint aforesaid charges your petitioner with the violation of a pretended act of the Legislature of the State of Minnesota, entitled "An act for the protection of the public health by providing for the inspection of cattle, sheep, and swine designed

for slaughter for human food," which said act was approved April 16th, 1889.

Your petitioner further shows that at the time and place charged in said affidavit and complaint he offered for sale and actually sold a quantity of fresh uncured beef, then and there intended the same for consumption as human food in said county of Ramsey and State of Minnesota, which beef was the part of an animal which had been slaughtered in the State of Illinois and therefrom carried to said county of Ramsey and State of Minnesota, and was perfectly healthy and in all respects proper and suitable for human food, but said animal had not been inspected alive within said county of Ramsey nor within said State of Minnesota, where he offered and sold said beef as aforesaid, by any inspector or his deputy appointed under any law of said State of Minnesota, although prior to the time he offered and exposed said beef for sale inspectors had been appointed under the act aforesaid, who were then and there ready and willing to make inspection as by said act provided.

Your petitioner further shows that said beef so sold by him was the property of Armour and Co., a copartnership for whom your petitioner is the agent, all the members of which copartnership are citizens of the State of Illinois, and who now are and for a long time past have been engaged at Chicago, in the State of Illinois, in the business of slaughtering cattle at the said city of Chicago and
5 shipping the fresh beef therefrom into various States of the United States and there selling the same for human food.

And your petitioner shows that his restraint and imprisonment aforesaid are unauthorized and illegal, because—

First. The said act of the Legislature of the State of Minnesota is in violation of art. 1, sec. 8, of the Constitution of the United States, which provides that "the Congress shall have power to regulate commerce among the several States."

Second. The said act of the Legislature of the State of Minnesota is in violation of section 2, art. 4, of the Constitution of the United States, which provides that the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States.

Third. The act aforesaid, being in conflict with the provisions of the Constitution of the United States, is void, and said justice of the peace was without jurisdiction in the case aforesaid.

Therefore your petitioner asks that a writ of *habeas corpus* may be granted, and that he may be discharged from such unlawful restraint and imprisonment.

HENRY E. BARBER.

6 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Henry E. Barber, being duly sworn, upon oath says that he is the petitioner in the above and foregoing petition, and that the matters and things therein set forth are true in substance and fact.

HENRY E. BARBER.

Subscribed and sworn to before me this 16th day of Sept., A. D. 1889.

H. C. McCARTY,
Notary Public, Minn.

On filing the within petition let a writ of *habeas corpus* issue, returnable within three days before me, at the front door of the custom-house.

St. Paul, Sept. 16, 1889.

R. R. NELSON, *Judge.*

(Endorsed:) Filed Sept. 16th, 1889. Oscar B. Hillis, clerk.

7 And afterwards, to wit, on the 17th day of Sept., A. D. 1889, the following writ of *habeas corpus* was issued out of this court; which said writ is in the words and figures following, to wit:

Writ of Habeas Corpus.

8 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

The President of the United States of America to Edwin S. Bean, sheriff and keeper of the common jail of Ramsey county, in the State of Minnesota, at the city of St Paul, in said State:

You are hereby commanded to have the body of Henry E. Barber, by you imprisoned and detained, as it is said, together with the time and cause of imprisonment and detention, by whatsoever name the said Henry E. Barber shall be called or charged, before Honorable R. R. Nelson, one of the judges of the United States circuit court for the district of Minnesota, at the front court-room of said court, in the city of Saint Paul, on the 17th day of September, A. D. 1889, at 10 o'clock a. m. of said day, to do and receive what shall then and there be determined concerning the said Henry E. Barber.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 16th day of September, A. D. 1889.

Issued at my office, in the city of Saint Paul, under the seal of said circuit court, the day and year last aforesaid.

[Seal U. S. Circuit Court.]

OSCAR B. HILLIS, *Clerk.*

Endorsed: Filed Sept. 17, 1889. Oscar B. Hillis, clerk.

9 And on the same date, to wit, Sept. 17th, 1889, the marshal's return of service was attached to said writ and filed of record; which said return of service is in the words and figures following, to wit:

Marshal's Return of Service.

10 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

I hereby certify and return that I served the within writ on the therein-named Edwin S. Bean personally by handing to and leaving with him a true and correct copy thereof at St. Paul, in said district, on the 16th day of September, A. D. 1889.

W. M. CAMPBELL,
U. S. Marshal,
By WM. S. DAGGETT, *Deputy.*

(Endorsed:) Filed Sept. 17th, 1889. Oscar B. Hillis, clerk.

11 And on the same date, to wit, Sept. 17th, 1889, the following sheriff's return to the writ of *habeas corpus* was filed in this cause; which said return is in the words and figures following, to wit:

Sheriff's Return to Writ.

12 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

In the Circuit Court, Eighth Judicial District.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus.*

To the honorable the judges of the circuit court of the United States for the district of Minnesota:

In answer to the writ of *habeas corpus* to me directed (a copy of which is hereto attached), directing me to produce before your honors the body of Henry E. Barber in said writ described, the undersigned produces here in court the said Henry E. Barber and respectfully reports that the cause of his detention and imprisonment is as follows:

The undersigned is the sheriff of the county of Ramsey and State of Minnesota, and as such sheriff is the keeper of the common jail of said county; and on the 16th day of September, A.D. 1889, the body of said Henry E. Barber was delivered to the undersigned, as such keeper of said common jail, together with a writ of commitment to me directed from one William Clark, one of the justices of the peace in and for said Ramsey county (copy of which writ is hereto attached), and he holds and detains said Barber under said writ.

ED. S. BEAN.

Subscribed and sworn to before me this 17th day of Sept., A. D. 1889.

L. P. RICHARDSON.
Deputy Clerk U. S. Circuit Court.

13 STATE OF MINNESOTA, } ss:
County of Ramsey, }

The State of Minnesota to any constable and the keeper of the common jail of said county:

Whereas at a justice court held at my office, in said county, for the trial of Henry E. Barber for the offense hereafter stated, the said Henry E. Barber was convicted of having on the 16th day of Sept., A. D. 1889, in the said county, wrongfully and unlawfully offered and exposed for sale and having sold for human food a certain quantity, to wit, one hundred pounds, of fresh uncured beef, which said beef was then and there a part of an animal which had been slaughtered in the State of Illinois, and which animal had not been inspected and certified before slaughter by an inspector appointed under the laws of the State of Minnesota, and upon conviction the said court did adjudge and determine that the said Henry E. Barber be duly imprisoned in the common jail of said county for the period of thirty days: Therefore you, the said constable, are commanded forthwith to convey the said Henry E. Barber to the said keeper, and you, the said keeper, are hereby commanded to receive the said Henry E. Barber into your custody in the said jail and to confine him therein for the period of thirty days from this date or until he shall be thence discharged by due course of law.

Given under my hand this 16th day of September, A. D. 1889.

(Signed) WILLIAM CLARK,
Justice of the Peace.

14 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

The President of the United States of America to Edwin S. Bean, sheriff and keeper of the common jail of Ramsey county, in the State of Minnesota, at the city of St. Paul, in said State:

You are hereby commanded to have the body of Henry E. Barber, by you imprisoned and detained, as it is said, together with the time and cause of imprisonment and detention, by whatsoever name the said Henry E. Barber shall be called or charged, before Hon. R. R. Nelson, one of the judges of the United States circuit court for the district of Minnesota, at the front court-room of said court, in the city of St. Paul, on the 17th day of Sept., A. D. 1889, at 10 o'clock a. m. of said day, to do and receive what shall then and there be determined concerning the said Henry E. Barber.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 16th day of September, A. D. 1889.

Issued at my office, in the city of St. Paul, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] OSCAR B. HILLIS, *Clerk.*

I hereby certify that the foregoing is a true and correct copy of the original writ delivered to me for service.

W. M. CAMPBELL,
U. S. Marshal,
W. S. DAGGETT, *Deputy.*

End.: Filed Sept. 17, 1889. Oscar B. Hillis, clerk.

15 And afterwards, to wit, on the 17th day of September, A. D. 1889, the following letter from Moses E. Clapp, attorney general, to Gordon E. Cole, was filed in said cause; which said letter is in the words and figures following to wit:

Letter from Moses E. Clapp to Gordon E. Cole.

16 Cole, Bramhall & Morris, attorneys and counselors at law, 384 Jackson street. Gordon E. Cole, Wm. Ely Bramhall, Owen Morris.

ST. PAUL, MINN., *Sept.* 16, 1889.

Hon. Gordon E. Cole, St. Paul, Minn.

DEAR SIR: I am advised that a proceeding — to be had to-morrow before Hon. R. R. Nelson involving the constitutionality of the so-called meat-inspection bill, and that Judge Nelson has intimated a desire to hear what may be urged on the part of the State in behalf of said law. My engagements are such that I shall be absent from the city to-morrow, and I would esteem it a great favor if you will appear in behalf of the State, and so far as any authority may be desired therefor please treat this letter as full authority to appear and act on behalf of the State.

Yours very truly,
(Signed) MOSES E. CLAPP,
Attorney General.

End.: Filed Sept. 17, 1889. Oscar B. Hillis, clerk.

17 And on the same day, to wit, Sept. 17th, 1889, the following further proceedings were had and entered *the* record in this cause; which said proceedings were in the words and figures following, to wit:

Cause Argued and Submitted.

18 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus.*

SEPT. 17, 1889.

This day comes Edwin S. Bean, sheriff of Ramsey county, and produces in court the said H. E. Barber in obedience to a writ of *habeas corpus* issued herein.

And the marshal having filed the writ, with his return attached thereto, W. H. Sanborn, Esq., is heard on behalf of the prisoner and Gordon E. Cole, Esq., on behalf of the State, and the same is duly submitted and by the court taken under advisement.

It is ordered by the court that the said Henry E. Barber be admitted to bail on his own recognizance in the sum of one hundred (100) dollars.

Thereupon said Henry E. Barber takes such recognizance in open court to appear at 10 o'clock a. m. on the 23rd day of September, A. D. 1889.

19 And on the same day, to wit, Sept. 17th, 1889, the recognizance of Henry E. Barber was filed in this cause; which said recognizance was in the words and figures following, to wit:

Recognizance.

20 United States Circuit Court, District of Minnesota.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus.*

Now comes Henry E. Barber in open court and recognizes and promises to pay the sum of $100.00 in case he fails to appear in this court in this matter at 10 o'clock a. m. on the 24th day of Sept., A. D. 1889.

Sept. 17th, 1889.

HENRY E. BARBER.

(Endorsed:) Filed Sept. 17th, 1889. Oscar B. Hillis, clerk.

21 And afterwards, to wit, on the 23rd day of September, A. D. 1889, the following opinion discharging prisoner was filed in said cause; which said opinion is in the words and figures following, to wit:

Opinion.

22 United States Circuit Court, District of Minnesota.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus.*

SEPT. 23RD, 1889.

W. H. Sanborn, for petitioner; ex-Attorney General Cole & C. W. Bunn, for the State.

NELSON, *J.:*

The petitioner is brought before me upon a writ of *habeas corpus.* He alleges in his petition that he is restrained of his liberty by the sheriff of Ramsey county under a warrant of commitment issued by a justice of the peace, being found guilty of violating the following act of the Legislature of the State of Minnesota, approved April 16th, 1889, entitled "An act for the protection of the public health

by providing for the inspection before slaughter of cattle, sheep, and swine designed for slaughter for human food."

Be it enacted, &c.:

SECTION 1. The sale of any fresh beef, veal, mutton, lamb, or pork for human food in this State, except as hereinafter provided, is hereby prohibited.

Section 2 provides for the appointment of local inspectors.

Section 3 defines the duties of the inspectors, who must inspect the animals within 24 hours before slaughter.

23 SECTION 4. "Any person who shall sell, expose, or offer for sale for human food in this State any fresh beef, mutton, lamb, or pork whatsoever which has not been taken from an animal inspected and certified before slaughter by the proper inspector appointed hereunder shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine of not more than one hundred dollars or by imprisonment not exceeding three months for each offense."

The petitioner alleges that this act of the Legislature is in contravention of the Constitution of the U. S. and void, and that he is entitled to be discharged. The particular provisions of the Constitution relied upon are art. 1, sec. 8, which declares that—

"The Congress shall have power to regulate commerce among the several States;" and also art. 4, sec. 2, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The proper proceedings are taken to form the issue.

The counsel appearing on behalf of the State claim that the law was passed as a sanitary regulation under the power reserved to the States in article 10 of the Constitution of the United States.

The question of the validity of the act is to be determined under the proceedings. Is the law a valid and lawful exercise of State power to protect the public health, or does it pass beyond the
24 constitutional limit, invade the Federal domain, and substantially prohibit or burden interstate commerce, and also violate the rights secured to the citizens of the several States?

By its title the act purports to be for the protection of the public health, and it is urged that upon its face it does not deal with commerce and does not directly invade the domain of interstate commerce, but merely regulates the mode of sale of an article of commerce after it has become a part of the mass of the property of the State.

The States have never yielded to the Federal Government control of their internal commerce or their right to self protection. They have plenary powers to protect the lives, health, comfort, and safety of all persons and protection of all property within the State. Health inspection and quarantine laws are among the recognized lawful legislation of a State and are necessary and advisable for the public welfare. They are self defensive, and no Federal power is trenched upon by their enactment. Such laws may in many instances incidentally affect interstate commerce, yet are not necessarily a regulation of it. If the law of the State of Minnesota is a

proper and reasonable exercise of its police powers it violates no provision of the Constitution of the United States.

There has been a conflict for many years and much litigation in respect to the extent of the powers reserved to the States in the Federal Constitution. This controversy is perennial. The Supreme Court of the United States has explained in many later cases its previous decisions in regard to the extent of the police power of the States. Yet the line of demarcation between the delegated power of Congress and the reserved powers of the States is not defined with such accurate decision that it is easy to determine the boundary limit in all cases, but the Supreme Court always has stood firm and tenaciously resisted every attempt of a State to encroach upon the exclusive power of the Federal Government under the commercial clause of the Constitution, and there is a consension of opinion among the judges upon that subject.

The counsel for the State urges that this statute is a reasonable self-protective law. They put it forcibly in this form: "Whatever the State deems it necessary to do within her own borders for the protection of the health of the citizen she may constitutionally do under the primal and paramount law of self protection, which is nature's earliest enactment to which no human legislation ever ran counter. Subject to this only qualification, that, from facts apparent on the face of the law, or of which the court may take judicial cognizance, the cogent presumptions in its favor are not overthrown by bad faith in its enactment." If I clearly understand counsel, this is not an unfair statement of the reserved powers of the States. It is only this, in substance; a law to protect health may be enacted by a State, and is valid unless it is a usurpation upon the General Government by the invasion of a power exclusively vested in Congress. If a State arrogates powers so delegated and exercises control over a subject exclusively confided by the Federal Constitution to Congress it certainly is guilty of bad faith, for it violates that covenant by which we became one people.

The States, as I said, are clothed with plenary police power and large discretion in its exercise for the protection of the public health and comfort, but in order to determine whether the act of the State is really a usurpation of power the courts are required to look at the effect and operation of the law and are not bound by mere form.

In Henderson *v.* Mayor, 112 U. S., page 259, Mr. Justice Miller, speaking of the police power of the States, said:

"Whatever may be the nature and extent of the power, where not otherwise restricted, no definition and no urgency for its use can authorize a State to use it in regard to a subject-matter which has been confided exclusively to Congress by the Constitution.

It is clear from the nature of our complex form of government that whenever a statute of a State invades the domain of the legislation which belongs exclusively to the Congress of the United States it is void, no matter under what class of powers it may fall nor how closely allied to powers conceded to belong to the States."

So in Mugler *vs.* Kansas, 123 U. S., page 623, Mr. Justice Harlan speaking for the court:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate
27 exertion of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go. The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon an inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. * * * Undoubtedly the State when providing for the protection of the public health, public morals, and public safety is subject to the paramount authority of the Constitution of the United States and may not violate rights secured or guaranteed by that instrument or interfere with the execution of the powers confided to the General Government." While it must be admitted that the line of distinction between what is legitimate police regulation and what constitutes an interference with commerce is dim and shadowy, it is settled that when a law reaches beyond its professed object and into the domain of the Federal Government, no matter what may be its title or in what form the details are expressed, it is unconstitutional.

28 The practical effect and operation of this law excludes the importation of all dressed meats to be sold for human food from animals slaughtered outside of the State of Minnesota.

It excludes without reference to its quality or condition a commodity known to be an article of commerce by the usages of the commercial world and an important item of interstate traffic, and practically declares that it does not belong to commerce.

It says to all persons engaged in the business of selling dressed meats for food in this State, "You must have the animal from which the meat is taken inspected by local inspectors in the State within twenty-four hours before slaughter, or suffer extreme penalties." It is not questioned that sound dressed beef is an article of commerce, but this law is attempted to be maintained as a reasonable regulation of the mode of sale after it has become a part of the mass of property of the State, and it is urged that, as it does not forbid the importation of dressed meat, but only the sale for human food after importation, it is valid.

In the argument counsel stated that "private families could import for their own consumption, and that inn-keepers and like public resorts are not prevented from buying dressed meat outside the State and bringing it in for use." If this is a correct interpretation of the law—if individuals for private use as food and inn-keepers who feed thousands of people can freely import for use, and the sale is only forbidden—how does such a measure protect the public health
29 and promote the public welfare? Does it not conclusively show that the Legislature was not influenced by considerations

for the public health, safety, and comfort, but its policy was directed to other ends? The authorities, however, establish the propositions (1) that no article of commerce can be excluded from importation and sale in a State by statutes like the one in question; (2) that any act of a State interfering in any way with the free traffic between citizens of different States in any article of commerce is an attempted regulation of such commerce and an invasion of the power exclusively conferred upon Congress, and its non-action with respect to any particular commodity is a declaration of its purpose that the commerce in that commodity shall be free.

When this law is tested by the decisions of the Supreme Court of the United States it will be found that it oversteps the limit of State jurisdiction and needlessly obstructs interstate commerce.

In Brown *vs.* Maryland, Chief Justice Marshall delivering the opinion of the court, said: "There is no difference in effect between power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. * * * If this power reaches the interior of a State and may be there exercised it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic when given in the most comprehensive terms with the intent that its efficacy should be complete should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell."

The same principle was asserted in the license cases, 5th Howard, 588. Mr. Justice McLean said: "The Federal Government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear that while these supreme functions are exercised by the Federal and State governments within their respective limitations they can never come in conflict; and when a conflict occurs the inquiry must necessarily be, Which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The Federal Government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the States are void when they do that which is inhibited to them or exercise a power which they have exclusively delegated to the Federal Government." In Railroad Co. *vs.* Husen, 95 U. S., 465, the court said: "We admit that the deposit in Congress of the power to regulate commerce among the States was not a surrender of that which may properly be denominated police

power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety; * * * but whatever may be the nature and reach of the police power of the State it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. * * * Neither the unlimited powers of a State to tax or any of its police powers can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. * * * While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious and infectious diseases, or convicts, etc., from entering the State; while for the purposes of self protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self protection. It may not, under cover of exerting police powers, substantially prohibit or burden either foreign or interstate commerce." So in Bow-
32 man *vs.* Railroad Co., 125 U. S., Mr. Justice Matthews says:

"If from its nature it does not belong to commerce, or if its condition from putrescence or other cause is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction, and as an incident to this power a State may use means to ascertain the fact; and here is the limit between the sovereign power of the State and the Federal power—that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State and that which does belong to commerce is within the jurisdiction of the United States." I forbear further quotations and refer to the opinion of the court in full.

Undoubtedly the State may provide for the reasonable inspection of dressed meat or any article of commerce and prohibit its introduction into the State if found in fact unwholesome and unfit for use as food, but it cannot encroach upon the power of Congress to regulate interstate commerce. It cannot go to the extent of prohibiting the introduction of a sound commercial commodity.

A State may exclude any infected article of commerce from reaching the importer, but this law excludes the sound and infected alike and declares it unfit for human food under the guise of health regulation. Such a law transcends the police power of a State, for it at-
tempts to obstruct commerce, and if it can exclude sound
33 dressed meat it may prohibit the importation and sale of any commodity, and as said thus, "commercial anarchy and confusion would result from the diverse exertions of power by the several States of the Union."

The case of Powell *vs.* Penn., 127 U. S., does not overrule the decisions above cited. No conflict arose in that case between the police power of the State and the power of Congress to regulate interstate commerce, and nothing therein said is inconsistent with the previous

decisions of the court in regard to the commercial clause of the Constitution.

That the law violates art. 4, sec. 2, I think is manifest from the preceding quotations and the authorities cited by counsel, viz: Ward *vs.* Maryland, 12 Wall., 418; Tiernan *vs.* Ricker, 102 U. S., 123; Walling *vs.* Michigan, 116 U. S., 446; *In re* Watson, 15 Federal R., page 511.

I have come to the conclusion that the law is not a proper and lawful exercise of the police power of the State and is unconstitutional.

The petitioner is discharged.

(Endorsed:) Filed Sept. 23rd, 1889. Oscar B. Hillis, clerk.

34 And on the same day, to wit, September 23rd, 1889, pursuant to said opinion, the following order discharging prisoner and allowing appeal to United States Supreme Court was entered of record in Term Minutes "H," page 279; which said record entries are in the words and figures following, to wit:

35 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus*.

SEPT. 23, 1889.

The petition of Henry E. Barber for a writ of *habeas corpus* having been heretofore heard by the court, duly submitted, and by the court taken under advisement—

Now, on filing the opinion of the Hon. R. R. Nelson in the above-entitled matter and his order thereon—

Pursuant thereto, it is ordered and adjudged that the said prisoner, Henry E. Barber, be, and he is hereby, discharged.

Thereupon Gordon E. Cole, on behalf of the State of Minnesota, in open court prays an appeal from the above order and judgment made herein discharging the petitioner to the Supreme Court of the United States, and it is hereby ordered that said appeal be allowed, and that the appellant cause a transcript of the petition, writ of *habeas corpus* and of the return thereto, and all other proceedings in this cause to be duly certified up into the said Supreme Court of the United States, according to the law and the rules of said court.

It is further ordered that the recognizance heretofore entered into by the prisoner to appear in this court upon Monday, September 23rd, 1889, be continued in force and stand in lieu of other
36 bail for his appearance to answer the judgment of the Supreme Court of the United States and until discharged by due process of law.

37 And afterwards, to wit, on the 25th day of September, A. D. 1889, the following appeal bond was filed in said cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

38 DISTRICT OF MINNESOTA:

United States Circuit Court.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus.*

Know all men by these presents that we, Moses E. Clapp, attorney general of the State of Minnesota, on behalf of said State, as principal, and J. P. Williams and Geo. L. Becker, as sureties, of the county of Ramsey and State of Minnesota, are held and firmly bound unto Henry E. Barber in the sum of five hundred dollars; to the payment of which, well and truly to be made to said Barber, his executors, administrators, or assigns, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals this 25th day of September, 1889.

The condition of this obligation is such that whereas the above-named State of Minnesota hath appealed from the order and judgment of the circuit court of the United States for the district of Minnesota, heretofore made in this proceeding, discharging said Henry F. Barber from imprisonment on a writ of *habeas corpus:*

Now, therefore, the condition of this obligation is such that if the above-named The State of Minnesota shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise in full force and effect.

MOSES. E. CLAPP. [SEAL.]
JOHN P. WILLIAMS. [SEAL.]
GEORGE L. BECKER. [SEAL.]

In the presence of—
H. P. HATCH.
WM. ELY BRAMHALL.

39 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

—— ——, being duly sworn, depose and say and each for himself says that he is one of the sureties named in and who signed the foregoing bond, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities and exclusive of his property exempt from execution.

JOHN P. WILLIAMS.
GEORGE L. BECKER.

Subscribed and sworn to before me this 25th day of September, 1889.

[L. S.] WM. ELY BRAMHALL,
Notary Public, Ramsey County, Minnesota.

UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

Moses E. Clapp and J. P. Williams and George L. Becker before me personally appeared on this 25th day of September, 1889, to me well known to be the same persons described in and who executed the foregoing bond, and did each for himself duly acknowledge that he executed the same as his free act and deed.

[L. S.] WM. ELY BRAMHALL,
Notary Public, Ramsey County, Minn.

I approve the above bond and the sufficiency of the sureties thereto.

Dated Sept. 26, 1889.

R. R. NELSON, *Judge.*

40 [Endorsed:] Copy. U. S. circuit court, dist. of Minnesota. In the matter of the petition of Henry E. Barber for a writ of *habeas corpus.* Appeal bond. Filed Sept. 25, '89. Oscar B. Hillis, clerk. Gordon E. Cole, att'y for State of Minnesota.

41 And on the same day, to wit, September 25th, A. D. 1889, the following assignment of errors was filed in said cause; which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors.

42 United States Circuit Court, District of Minnesota.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus.*

The State of Minnesota, having appealed to the Supreme Court of the United States from the judgment in the above-entitled proceedings, assigns the following errors:

I.

That the court erred in discharging the prisoner on the ground that chapter 8 of the General Laws of the State of Minnesota for 1889, being an act for the protection of the public health by providing for inspection before slaughter of cattle, sheep, and swine designed for slaughter for human food, approved April 16th, 1889, is unconstitutional and void because it infringes any clause of the Constitution of the United States.

II.

It erred in holding that said act infringes the provision of section 8 of article 1 of the Constitution of the United States, declaring that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

III.

It erred in holding that said act was void as infringing section 2 of article four of the Constitution of the United States, declaring that the citizens of each State shall be entitled to all the privi-
43 leges and immunities of citizens of the several States.

IV.

It erred in holding that said act infringes the fourteenth amendment of the Constitution of the United States.

V.

It erred in discharging the prisoner upon the ground that said law was not a valid and constitutional exercise of the public powers of the State.

VI.

It erred in refusing to sustain said act as valid and constitutional and in discharging the prisoner from imprisonment for a violation thereof.

GORDON E. COLE,
Attorney for State of Minnesota.

44 [Endorsed:] Copy. U. S. circuit court, district of Minnesota. In the matter of the petition of Henry E. Barber for a writ of *habeas corpus*. Assignment of errors.
End.: Filed Sept. 25, '89. Oscar B. Hillis, clerk. Gordon E. Cole, att'y for State of Minnesota.

45 And on the same day, to wit, September 25th, A. D. 1889, the following original citation and admission of service *was* filed in said cause; which original citation, &c., are as follows:

Citation.

46 UNITED STATES OF AMERICA, *ss:*

To Henry E. Barber and John B. and W. H. Sanborn, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the third Monday of October, 1889, pursuant to an appeal allowed by the circuit court of the United States for the district of Minnesota, wherein The State of Minnesota is appellant and you are respondent, to show cause, if any there be, why the judgment appealed from should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-fifth day of September, 1889.

R. R. NELSON,
District Judge.

47 [Endorsed:] Ent. 91, Crim. Original. U. S. circuit court, district of Minnesota. In the matter of the petition of Henry E. Barber for a writ of *habeas corpus*. Citation. Filed Sept. 25, 1889. Oscar B. Hillis, clerk. Gordon E. Cole, att'y for State of Minnesota.

Due personal service of the within citation admitted on us at St. Paul, Minn., on this 25th day of September, 1889.

JOHN B. & W. H. SANBORN,
Atty's for the Petitioner, Henry E. Barber.

48 And on the same day, to wit, September 25th, A. D. 1889, the following order regarding transcript to the United States Supreme Court was filed in said cause; which said order is in the words and figures following, to wit:

Order.

49 United States Circuit Court, District of Minnesota.

In the Matter of the Petition of HENRY E. BARBER for a Writ of *Habeas Corpus.*

An appeal by the State of Minnesota having been allowed, the clerk is hereby ordered and directed to send up to the Supreme Court of the United States forthwith a transcript of the petition, writ of *habeas corpus*, return thereto, the judgment, and all other papers, entries, or orders on file in his office or appearing in his minutes in said proceeding.

Done at the general term, begun and holden on the 17th day of June, 1889.

R. R. NELSON,
District Judge.

50 [Endorsed:] Copy. U. S. circuit court, district of Minnesota. In the matter of the petition of Henry E. Barber for a writ of *habeas corpus*. Order. Filed Sept. 25, '89. Oscar B. Hillis, clerk. Gordon E. Cole, att'y for State of Minnesota.

51 UNITED STATES OF AMERICA, *District of Minnesota,* } *ss:*

Circuit Court of the United States.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 34 pages, numbered consecutively from 1 to 34, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause and of the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 2nd day of October, in the year of our Lord one thousand eight hundred and 89, and of the Independence of the United States the one hundred and — (114th) year.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk*,
L. P. RICHARDSON, *Deputy*.

[Endorsed:] United States circuit court, district of Minnesota. In the matter of the petition of Henry E. Barber for a writ of *habeas corpus*. Return to Supreme Court.

Endorsed on cover: Minnesota C. C. U. S. No. 1346. The State of Minnesota, appellant, *vs.* Henry E. Barber. Filed October 14, 1889.

Office Supreme Court U. S.
FILED.
OCT 14 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

In the Matter of the Application of Henry E. Barber for a Writ of Habeas Corpus.

THE STATE OF MINNESOTA,
Appellant,

vs.

HENRY E. BARBER,
Respondent.

Points and Authorities for Appellant.

By GORDON E. COLE,
Attorney for State of Minnesota.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF HENRY E. BARBER FOR WRIT OF HABEAS CORPUS.

THE STATE OF MINNESOTA,

Appellant,

vs.

HENRY E. BARBER,

Respondent.

I.

STATEMENT OF THE CASE.

This case is an appeal by the State of Minnesota from the judgment of the Circuit Court of the United States sitting in and for the State of Minnesota, discharging the respondent from imprisonment under a conviction by a competent court of that State for a violation of its inspection laws, to-wit, chapter eight of the General Session Laws of 1889, entitled "An act

for the protection of the public health, by providing for inspection before slaughter of cattle, sheep and swine designed for slaughter for human food," approved April 16, 1889.

The terms of the act are as follows:

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The sale of any fresh beef, veal, mutton, lamb or pork for human food in this State, except as hereinafter provided, is hereby prohibited.

Sec. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs and townships within this State to appoint one or more inspectors of cattle, sheep and swine for said city, village, borough or township, who shall hold their offices for one year and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially coextensive with the board so appointing them, and said several boards shall regulate the form of certificate to be issued by such inspectors and the fees to be paid them by the person applying for such inspection, which fees shall be no greater than are actually necessary to defray the costs of the inspection provided for in section three of this act.

Sec. 3. It shall be the duty of the inspectors appointed hereunder to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions, within twenty-four hours before the slaughter of the same, and if found healthy and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect. If found unfit for food by reason of infectious disease, such inspectors shall order the immediate

removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

Sec. 4. Any person who shall sell, expose or offer for sale for human food in this State any fresh beef, veal, mutton, lamb or pork whatsoever which has not been taken from an animal inspected and certified before slaughter by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by imprisonment not exceeding three months for each offense.

Sec. 5. Each and every certificate made by inspectors under the provisions of this act shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were at the date of such inspection free from all indication of disease, apparently in good health, and in fit condition when inspected to be slaughtered for human food, a duplicate of which certificate shall be preserved in the office of the inspector.

Sec. 6. Any inspector making a false certificate shall be liable to a fine of not less than ten dollars nor more than fifty dollars for each animal falsely certified to be fit for human food under the provisions of this act.

Sec. 7. This act shall take effect and be in force from and after its passage.

The sole objections to the imprisonment of the respondent and the sole ground upon which the judgment discharging him was based were that the said law was unconstitutional upon the following grounds:

It violates section two of article four of the United States constitution which provides "the congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

2d. It violates the provisions of section two of article four of the constitution of the United States, which provides "that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

II.

ASSIGNMENT OF ERRORS.

The State of Minnesota having appealed to the Supreme Court of the United States from the judgment in the above entitled proceedings, assigns the following errors:

First.

That the court erred in discharging the prisoner on the ground that chapter eight of the General Laws of the State of Minnesota for 1889, being "an act for the protection of the public health by providing for inspection before slaughter, of cattle, sheep and swine, designed for slaughter for human food," approved April 16th, 1889, is unconstitutional and void, because it infringes any clause of the constitution of the United States.

Second.

It erred in holding that said act infringes the provision of section eight of article one of the constitution of the United States, declaring that congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

Third.

It erred in holding that said act was void as infringing section two of article four of the constitution of the United States, declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

Fourth.

It erred in holding that said act infringes the fourteenth amendment of the constitution of the United States.

Fifth.

It erred in discharging the prisoner upon the ground that said law was not a valid and constitutional exercise of the police powers of the State.

Sixth.

It erred in refusing to sustain said act as valid and constitutional, and in discharging the prisoner from imprisonment for a violation thereof.

GORDON E. COLE,
Attorney for State of Minnesota.

III.

APPELLANT'S POINTS AND AUTHORITIES.

The strongest presentation which can be made of the objections to the Minnesota meat inspection law is contained in Messrs. Veeder & Loomis' brief in the case of *Swift vs. Sutphin*, in the U. S. Circuit Court, Northern District of Illinois:

"Health laws may exclude all such portions or cargoes as are infectious, but they cannot include a whole class of imported merchandise, on the ground that infected portions or cargoes of it have been or may be imported. Infected articles of commerce may rightfully be excluded from passing the boundaries of a State and into the hands of the importer as well as the consumer. But a State cannot exclude any sound article of commerce from reaching the importer. This, however, is just exactly what this Minnesota act has attempted to do, and herein lies its invalidity."

This may be accepted as an accurate statement of the law subject to one single qualification, and upon the qualification hangs the validity or invalidity of the Minnesota enactment.*

A State cannot exclude any sound article of commerce from reaching the importer, unless in order to ascertain whether the article is sound or unsound it is necessary to adopt such measures of inspection as will indirectly exclude the importation of such article.

To this necessity even the provisions of the federal constitution conferring upon congress the power of regulating commerce, potent as they are in everything else, must yield.

"*Salus populi est suprema lex.*"

* Assuming for the sake of the argument, what is not true in fact, that it does exclude any article of commerce from reaching the importer.

For several years rumors of diseases of cattle, peculiar to the vast humid and malaria breeding plains of Texas and the west and southwest, have been prevalent, notably Texas fever, pleuro pneumonia and diseases of the throat and lungs. To such an extent have these diseases prevailed in those localities that it is a part of the current history of the day that the American States and foreign nations have found it necessary to adopt measures for the protection of the health of their herds and of their citizens.

Within the last few years the development of the Montana cattle ranges have caused a general movement of cattle from the infected localities northward.

Synchronous with this northerly movement of Texas beeves has been developed a new industry whose strides have indeed been marvelous. Monster packing houses have been erected at various trade centers, as Chicago and Kansas City, wherein millions of cattle which formerly migrated upon the hoof, and against danger from which protective measures were easily applied, are annually slaughtered and the dressed meat exported, not only to every State in the Union but to every quarter of the globe. In all the great cities and smaller towns of Canada, and the Eastern States, the signs of Armour & Co. and Swift & Co. decorate every market house, and meat slaughtered and dressed by them finds its way to the table of nearly every hotel and private family in the land. Montana and Texas cattle daily pass through this State to Chicago, and are there slaughtered, and the dressed meat sent back to this State by the car load is fast becoming the exclusive animal food on sale in our markets or used upon our tables.

The very universality of this enormous traffic renders protective measures proportionately imperative.

It devolves on the party opposing the law to demonstrate that its provisions needlessly impose restrictions upon a sound article of commerce. Ordinarily the question is a legislative question, with which the courts will not interfere.

Powell vs. Pennsylvania, 127 U. S. 678.

Can the court see that as claimed by the clamors of interested parties with which the newspapers have teemed at and since the passage of this law, that this law is a fraudulent one intended to protect some dealers against a monopoly, and that it unnecessarily excludes a sound article of commerce?

That it may incidentally afford protection to home dealers ought not to be charged against the law if its necessity as an inspection law is apparent, or if such necessity is possible or probable, and the want of such necessity not demonstrated.

The diseases from which the law seeks to protect our people are located in the vital parts of the animal. Pleuro pneumonia is a disease of the lungs, as is tuberculosis in its various forms. The latter is very prevalent among the thoroughbreds, the importation and breeding of which have become so common. This court has only to visit any farm where pure blood Shorthorns are reared and pampered for exhibition at fairs and fat stock shows, to learn the prevalence of consumption among the purest breeds.

Diseases of the blood exhibiting themselves in cancerous excrescences and loathsome sores known as lump jaw are also exceedingly common. The presence of these diseases can be as readily detected by the

symptoms in life as in the human subject. It requires no expert, a glance often suffices; but the entrails of the animal do not accompany the dressed meat, nor could the carcasses be transported accompanied by the entrails for any considerable distance so as to preserve the latter from decay.

The examination of the hind quarter of an ox will not detect tubercles in his lungs or cancerous tumors upon his neck.

If these statements are true, and I am prepared to prove them if the court thinks such evidence competent or called for, the necessity which results in the exclusion of, not an article of commerce, but of an article of commerce in a particular form, is apparent.

But the Minnesota law does not prevent any article, sound or unsound, from reaching the importer. It is to be noticed that meats as an article of human food may be introduced freely, notwithstanding the law, and if the cattle which are passing through St. Paul and Minneapolis daily by the train load to the shambles of Chicago, are stopped in transit and slaughtered here, the law interposes no obstacles. It is because no opportunity to inspect them in this condition is afforded that a law becomes necessary which indirectly excludes fresh meat in a particular form from our markets. It is not the importation, however, but the sale which is prohibited. The sale of all meats, whether domestic or foreign, without the required inspection is alone prohibited. The law can touch no imported meats until after the act of importation has ceased.

See *Coe vs. Erroll, 116 U. S. 517.*

As said by the court in *Bowman vs. C. & N. W. R'y Co., 125 U. S. 165:* "If it (say beef, for instance)

does not belong to commerce, or its condition from putrescence or other causes is such when about to enter the State that it no longer belongs to commerce or is not a commercial article, then the State power may exclude its introduction. *And as an incident to this power, the State may use means to ascertain the fact.*"

Those means in the nature of the case must be adequate. If an examination of a side of beef can disclose nothing as to the health of the animal, and that can only be known by an examination of symptoms in life, or the organs *in situ* after death, which latter is impracticable when killed at a great distance from our borders, then inspection on the hoof is the only means remaining, and those means may be adopted without regard to the incidental effect on commerce in a particular form or condition of the animal.

Our opponents will doubtless urge the stereotyped illustration, the *argumentum ad hominem* by which it is sought to overthrow this law, that there is a poisonous fungus called ergot, which frequently grows upon wheat, which causes deleterious effects upon the human system; and hence, the State of Illinois may prohibit the sale of Minnesota flour unless the wheat has been inspected in the bins. For some thousands of years, certainly as early as the days when the great Jewish financier got up the first corner on wheat under the shadow of the pyramids, men have been making use of flour as the staff of life, and no deleterious influence has ever been suspected by reason of the deadly ergot which the fertile imagination of counsel has concealed in the snowy depths of the flour barrel.

But if in Minneapolis a process was as commonly

in use as the prevalence of Texas fever is in the malarial regions of the southwest, from whence the Chicago and Kansas City dealers draw their chief supplies, by which a deadly and poisonous quality was imparted to the wheat which by the peculiar color of the kernel was readily detected in wheat but could not be detected in flour, the State of Illinois would not only be justified in requiring the inspection of all wheat from that locality before it should be ground into flour, but her legislature would be derelict in the highest duty which a State can owe to its citizens if it did not promptly afford them the protection of such an inspection law.

But it is not a satisfactory answer to the claim of the State of the right to adopt such measures as are necessary to detect disease; that if the State may do this she may adopt the same policy with reference to articles which have no relation to the public health. The argument is often made in regard to powers that all concede to be vital to the public safety, but it does not disprove their existence; that a power may be abused is not a reason for withholding the right to exercise it in proper cases.

It is to be observed that the present law does not deal with interstate commerce at all, except as such commerce may be incidentally affected by its execution. It does not, as did the law before the court in *Bowman vs. R'y Co.*, meet at the border of the State a large and common object of commerce, and prohibit its crossing the State line.

It does not prevent the transmission of dressed beef through the State. It does not prohibit its introduction into the State where it may be sold for any purpose save for human food. It does not directly

invade the domain of interstate commerce. It regulates the mode of sale of a certain article of commerce after it has become a part of the mass of the property of the State.

Chicago beef can be freely bought here on the hoof and sold upon the same terms as domestic meat, as was said by the Supreme Court of the United States in the passenger cases, *5 How. 514–577.*

"A State is not bound to find a market for imported goods nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens," and this language has been adopted by the Supreme Court of Minnesota as a part of its decision in the oleomargarine case (*Butler vs. Chambers, 36 Minn. 69,*) in which the decision was the same as that of this court in *Powell vs. Pennsylvania.*

The law in question here is not a law directed at interstate commerce, like *Bowman vs. Railway Co., 125 U. S. 465–498*, and *Railway Co. vs. Husen, 95 U. S. 465*, but should be classed with the oleomargarine cases of Minnesota and Pennsylvania, sustained by the supreme courts of Minnesota and of the United States, the oil inspection law of Kentucky, sustained by the Supreme Court of the United States, and the the slaughter house ordinances of the city of New Orleans.

All these laws were police laws, acting within the State, and, of course, all property coming into the State must be subject to them, but neither imposed any prohibition upon the free importation.

In the slaughter house cases, *16 Wallace, 36–63*, it was said "that the regulation of the place and manner of conducting the slaughtering of animals and of the

business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most frequent exercise of the police powers."

In *Patterson vs. Kentucky, 97 U. S. 501*, a party having a patent for an improved burning oil was arrested and convicted in Kentucky, under an inspection law prohibiting the sale of oil which would ignite at less than a certain temperature, for selling oil manufactured in accordance with his patent. The constitution and patent laws of the United States were invoked, and it was claimed that the State law was an infringement thereof, but the court said:

"The statute expresses, in the most solemn form, the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus prescribed by the State is wise or unwise it is not the province of the National authorities to determine. That belongs to each State under its own sense of duty; its action in this respect is beyond the controlling powers of this court—it is clearly a police regulation.

"It is not to be supposed that congress intended to authorize or regulate the sale within a State of tangible personal property which the State declares to be unfit or unsafe for life, and by statute has prohibited from being sold or offered for sale within its limits.

"It was held by Chief Justice Shaw to be a settled principle growing out of the nature of well ordered society that every holder of property, however absolute or unqualified may be his title, holds it under the implied liability that his use of it shall not be injuri-

ous to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the lives of the community, citing *Commonwealth vs. Alger, 7 Conn. 53.*

"In recognition of this fundamental principle we have frequently decided that the police power of the States was not surrendered when the constitution conferred upon congress the general power to regulate commerce with foreign nations and between the several States.

"Considerations gathered from the former decisions of this court would seem to justify the conclusion that the right which the patentee or assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few."

If the State may by the exercise of its police power determine for itself what test shall be made of the safety of illuminating oils, and prohibit the sale of all oils not subjected to and sustaining such test, although such oils are manufactured by a process patented under the constitution and laws of the United States, why may it not determine for itself what test shall be made of the wholesomeness and safety of food products, and prohibit the sale of all such products not submitted to and sustaining the test, although it may chance that articles otherwise subject to the constitution and laws of the United States cannot sustain the test?

The analogy seems close.

In *Powell vs. Pennsylvania, 127 U. S. 678*, the oleomargarine law of Pennsylvania was considered and upheld.

It declared under a penalty "that no person shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food, any compound of any oleaginous substance other than that produced from unadulterated milk, or cream from the same, designed to take the place of butter or cheese, etc."

The defendant offered to prove that the article sold by him was perfectly wholesome, and manufactured from pure animal fats. The evidence was excluded upon the ground that whether the sale of oleomargarine was dangerous to the public health, was wholly a legisiative question.

The Supreme Court said in regard to the offer:

"It is entirely consistent with that offer that many, indeed most kinds of oleomargarine butter in the market, contain ingredients that are or may become injurious to health. The court cannot say from anything of which it may take judicial notice, under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, that such is not the fact. Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

"Whether the manufacture of oleomargarine or imitation butter of the kind described in the statute is or may be conducted in such a way or with such

skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to public health as to require for the protection of the people the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine.

"And as it does not appear from the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of these questions is conclusive upon the courts. It is not a part of their functions to conduct investigations into facts, and to sustain or frustrate the legislative will embodied in statutes as they may happen to approve or disapprove of its determination of such questions."

The court will not, surely, presume a co-ordinate department of the State to have been guilty of bad faith in the passage of a statute. They must presume, in the absence of anything apparent upon the face of the statute, or of which they can take judicial cognizance, that the legislature of this State in the passage of the meat inspection law, deemed it necessary to the public health to require inspection on the hoof.

I have hereinbefore stated the reasons, based on matters of common knowledge, of which no court will affect to be ignorant, why the legislature might consider such inspection necessary—if those reasons are plausible ones and tend to support the presumption of good faith, which unsupported is a very violent one, the court must assume that such inspection is neces-

sary to the detection of disease and unwholesome properties which render the meat unfit for human food. If such inspection is necessary for such purposes, can any clause of the federal constitution prevent the exercise of the police power of the State in providing for it, although incidentally its effect may be to prevent the importation in a particular form of an article of commerce in which disease and unwholesomeness may exist without the possibility of detection.

As said by the Supreme Court of the United States in *Patterson vs. Kentucky*, *97 U. S. 505*, cited *ante*, the police powers of the State were not superseded when the constitution conferred upon congress the general power to regulate commerce with foreign nations and between the several States.

It was said in *Shirlock vs. Alling*, *93 U. S. 99–103*, "that in conferring upon congress the power of regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life or safety of their citizens, though the legislation might *indirectly affect the commerce of the country*."

In *Gibbons vs. Ogden*, *9 Wheat*, *203*, the doctrine was laid down by Chief Justice Marshall, which, like many another great principle emanating from that great and luminous intellect, has become a part of the basis of our jurisprudence, never departed from, but repeatedly quoted and affirmed by his successors. He said:

"That inspection laws may have a remote and considerable influence on commerce will not be denied, but that a power to regulate commerce is the source

from which the right to pass them is derived, cannot be admitted.

"The object of inspection laws is to improve the quality of articles produced by the labor of a country —to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce between the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State *not surrendered to the general government*— all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, etc., are component parts of this mass."

Inspection laws were defined in *Turner vs. Maryland, 107 U. S., p. 55*, as follows:

"Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions and weight of package, and mode of putting up and marking and branding of various kinds—all those matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all these elements should so exist in order to make a valid inspection law; quality alone may be the subject of inspection without other requirements."

In *Bowman vs. Chicago, &c., R. R. Co., 125 U. S. 465*, inspection laws are said to be "confined to such particulars as in the estimation of the legislature and according to the customs of trade are deemed necessary to fit the inspected article for the market by

giving to the purchaser public assurance that the article is in that condition and of that quality which makes it merchantable and fit for use and consumption." (Page 488.)

"Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade which on account of their existing condition would bring in and spread disease, pestilence and death, such as rags or other substances infected with the germs of yellow fever or the virus of small pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise from their condition or quality unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce; they may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life.

"The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered as regulations of commerce prohibited by the constitution.

"If from its nature it does not belong to commerce, or if its condition from putrescence or other causes is such when it is about to enter the State that it no longer belongs to commerce, or in other words, is not a commercial article, then the State power may exclude its introduction. *And as an incident to this power, the State may use means to ascertain the fact.*"

This is just what the inspection laws of this State have done. They have prescribed the only means of inspection which they deemed adequate to the disclosure of disease.

But those who cite this case and that of *Railroad vs. Husen, 95 U. S. 465*, as authorities against the validity of the meat inspection law of Minnesota, utterly fail to mark the distiction between those cases and the one at bar.

In the Bowman case the law under discussion did not touch the sale of liquor after it had become a part of the property of the State but entered an adjoining State, and forbid a common carrier to bring within the limits of the State not poor liquor—not adulterated liquor, but all liquor.

In *Railroad vs. Husen* the law prohibited the introduction into or transit through the State of all Texas cattle during part of the year, whether diseased or not, and no method was prescribed for inspection for the purpose of determining.

The Minnesota inspection law neither prohibits the introduction of dressed meats nor their transit through the State. Any man may freely import them for his own consumption; and for any other purpose than human food, their sale, even, is unrestricted.

The law does not deal with them while they are articles of interstate commerce, but after they have become articles of State commerce it prohibits the sale of all meats not taken from animals inspected on the hoof by inspectors appointed by the authorities in this State.

Its language is:

SEC. 1. The sale of any fresh beef, veal, mutton, lamb or pork in this State, except as hereinafter provided, is prohibited.

Sections 2 and 3 provide for the appointment of inspectors and the mode of inspection and certificate conferring the right to sell.

And section 4 declares:

"Any person who shall sell, expose or offer for sale for human food, in this State, any fresh beef, veal, mutton, lamb or pork, whatsoever, which has not been taken from an animal inspected and certified before slaughter by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor."

As already said, it has ceased to an article of interstate commerce before the prohibition takes effect.

The Supreme Court have twice decided that the absolute prohibition of sale did not interfere with the power of congress to regulate commerce, if deemed necessary by the State in the exercise of its police power.

In the license cases, *5 How. 577*, Chief Justice Taney said:

"A State is not bound to find a market for imported goods, nor to abstain from the passage of any law it may deem necessary or advisable to guard the health or morals of its citizens."

And in *Bowman vs. Ch. R. R. Co., 125 U. S. 479*, the court said "the point in judgment in the license cases was strictly confined to the right of the State to prohibit the sale of intoxicating liquors after it had been brought within their territorial limits."

In the passenger cases, *7 How. 283*, the same point was decided, and it was further held "that all commercial action within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under State regulation. In giving the commercial powers the States did not part with the

power of self preservation which must be inherent in every organized community. They may guard against the introduction of anything which may corrupt the morals or endanger the health or lives of their citizens."

The powers granted to the general government by the several States leave a large residuum of power in the several States. In fact the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. *Art. 10, Const.*

If the States did not surrender the power of regulation for the protection of the public health, that power must be paramount to the power of congress to regulate commerce whenever a conflict ensues, if a conflict can ever arise; but under the construction uniformly given to the constitution by the Supreme Court a conflict can hardly arise, as the two powers move in different orbits.

So long as the police power acts within the State upon property within the State, it is held not to invade the domain of interstate commerce, although it may incidentally prevent its operation upon articles deemed dangerous to morals or life.

Three out of the eight judges of the Supreme Court who sat in the case of *Bowman vs. Ry. Co., 125 U. S.*, held that the right of importation did not carry with it by implication the right of sale in cases where the police powers of the State were exercised for the protection of the public health or morals; and the majority of the court waived a decision of the question on the ground that it was not necessarily involved in the case, so that as the law now stands in the Supreme Court of the United States, that tribunal has never held doctrines

that would prevent a State from absolutely prohibiting the sale of any article of import which it might deem dangerous to health.

This question thus left undecided in the Bowman case the Supreme Court of Iowa have just decided, viz., they hold that an absolute prohibition of the sale of an article deemed dangerous to public health or morals as a valid exercise of the police power as against everybody, no matter where they reside. In other words, that the right to import the prohibited article does not carry with it the right to sell it.

See *vs.* *43 N. W. Rep.*

The gist of the decision in the Bowman case is stated in the following words:

"The argument is that a prohibition of the sale cannot be made effective except by preventing the introduction of the subject of sale, that if its entrance into the State is permitted, the traffic cannot be suppressed. But the right to prohibit sales so far as conceded to the State arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it.

"It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extra-territorial powers cannot be assumed upon such an implication." (P. 499.)

In *Railroad Co. vs. Husen, 95 U. S. 465*, an act of the legislature of Missouri declared that no Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county of this State

between the 1st of March and 1st of November, the court held it void upon the same ground as in the Bowman case, saying:

"It meets at the borders of the State a large and common subject of commerce and prohibits its crossing the State line during two-thirds of the year."

But they admitted "that the deposit in congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated the police power. That by the general police power of the State persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State; of the perfect right of the legislature to do which, no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.

"The same principle also being conceded would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases.

"It may pass sanitary laws and laws for the protection of life, liberty, health or property within its borders, and may pass reasonable inspection laws, but may not interfere with transportation into or through the State beyond what is absolutely necessary for self-protection."

As already seen, the law in question does not interfere with transportation in any way whatever.

Brown vs. State of Maryland, 12 Wheat. 262, will probably be cited by our opponents. It was not a case arising under the police power but the taxing power, being an attempt to levy a tax upon imports from a foreign country. This distinction is vital.

A State may divest itself of the taxing power by valid contract, as in *Gordon vs. Appeal Tax Court, 3 How. 338;* but as said by this court in *Butcher's Union Co. vs. Crescent City Co., 111 U. S. 746:* "In regard to two subjects contained in the police power the legislature cannot, by any contract, limit the exercise of these powers to the prejudice of the general welfare. These are the public health and the public morals."

In *Brown vs. Maryland* the law required an importer to take a license and pay a tax before selling a package of imported goods. And in the opinion it was said: "That the power of regulating commerce could not be stopped at the external boundary of the State, but must enter its interior. That if the power reaches the interior of a State, it must be capable of authorizing the sale of those articles which it introduces."

This doctrine, as already seen, was subsequently modified in the license cases, *5 How.*, and the passenger cases, *7 How.*—and was absolutely denied by three out of the eight judges who sat in the Bowman case, so far as affected the public health or morals, the majority declining to express an opinion.

See *Stone vs. Mississippi, 101 U. S. 814.*

The case of *Welton vs. State of Missouri, 91 U. S. 275*, and many similar cases, may be cited but have no application. They are cases of the discrimination by State laws between the commodities of the State and those of other States.

Welton vs. State of Missouri was the case of a license tax imposed upon merchandise not the product of the State, and was held void on account of the discrimination.

Such were also the cases of *Ward vs. Maryland, 12 Wallace, 148*, and *Walling vs. Michigan, 116 U. S. 446;* but in the last case the court said: "It is suggested by the learned judge who delivered the opinion of the Supreme Court of Michigan in this case that the tax imposed is an exercise of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not *discriminate against the citizens and products of other States.*"

It was the case of a direct tax imposed upon citizens of other States which was not imposed upon the citizens of Michigan.

In all these cases the discriminations were purely arbitrary and based upon no pretence of necessity. The public health and morals would have been quite as well protected without the discrimination as with it.

But in *Woodruff vs. Parham, 8 Wallace, 129*, where a tax was upheld which was imposed on *all* sales at auction, the defense was on the ground that the defendants were auctioneers and consignees of large quantities of goods, the products of other States, which were taxed under the law. The court sustained the law.

It criticised and modified the doctrine of *Brown vs. State of Maryland, 12 Wheat.*, and said, "there is no attempt to discriminate injuriously against the products of other States. The case is not, therefore, one of an attempt to fetter commerce between the States, or to deprive the citizens of other States of the privileges or immunities possessed by the citizens of Alabama."

Robbins vs. Shelby County Taxing District, 120 U. S. 489, cited by respondent, was a case of a tax upon all drummers not having a regularly licensed house of business in the taxing district. In view of the fact that almost the entire trade of the country is carried on through commercial travelers; that they are the middlemen standing between the manufacturer, importer and wholesale dealer and the retail merchant, and inasmuch as the power to tax implies the power to destroy, and has no limit except the discretion of the legislature imposing the tax, to uphold such an exercise of the taxing power would be to sustain the power to lay a direct and absolute embargo upon the trade of a continent. But compare this case with *Woodruff vs. Parham, 8 Wallace, 189*, where a law taxing sales at auction was sustained against non-residents and commodities of other States.

In the one case the law overleaped the borders of the State and claimed the power to throttle all interstate commerce. The other operated only within the borders of the State upon property which had become subject to its laws. But as neither had the remotest reference to the exercise of the police powers, they are not in point here.

But the case of *Woodruff vs. Parham* contains an elaborate review of *Brown vs. State of Maryland*, and limits that decision to a denial of the right to tax imports from a foreign country in the original package, and denies its application at all to interstate commerce.

As already said, these cases were not cases arising under the police power. No question of the public health or safety was involved. If it had been neces-

sary for the protection of the public health to make a discrimination between the products of another State and the State passing the law, the law would have been upheld, although discriminating against the productions of other States.

Upon such right of discrimination rest all laws quarantining against infected ports, and such laws need not stop with excluding infected goods. They may exclude all goods from infected ports because there is no way of distinguishing between such as are infected and those that are not.

The case of *Woodruff vs. Parham, 8 Wallace*, just cited, affords an answer to the specious claim which has sometimes been made that the meat inspection law may be valid as to citizens of this State, and void as to citizens of other States. The law must stand or fall as to all alike. It would be absurd to suppose that the legislature would have passed the law if it had known that its effect would have been to impose the burdens of inspection upon its own citizens and leave those of other States free to flood the State with dressed beef and sell the same without inspection.

Citizens of other States are entitled under the fourteenth amendment of the constitution and section two of article four, to the same privileges and immunities as citizens of the State, but not to superior ones.

A somewhat similar claim was made in the late case of *Kimmish vs. Ball, 129 U. S. 217*.

The Iowa law provided:

"That if any person now or hereafter has in his possession in this State any Texas cattle which have not been wintered north of the southern line of Missouri or Kansas, he shall be liable for any damages which may accrue from allowing such cattle to run at

large and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished," etc.

It was claimed that this law discriminated against citizens of other States. But the court said:

"There is no denial of any rights or privileges to citizens of other States which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the spread of disease thereby, and the clause in the constitution declaring that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, does not give non-resident citizens of Iowa any greater privileges in that State than her own citizens enjoy. So far as liability is concerned for the act mentioned, citizens of other States and citizens of Iowa stand on the same footing."

This case is a full authority in support of the Minnesota law so far as discrimination is concerned. There is no discrimination. No one can sell without the inspection provided for. Citizens of Minnesota and of Illinois may alike purchase cattle in Texas, and bring them to Minnesota and have them inspected and slaughtered. Neither citizens of Illinois or Minnesota can slaughter them elsewhere and bring the dressed meat here and sell the same for human food, and thus debar the State authorities from the examination necessary to detect disease.

But none of these cases are in point. The case of *Mugler vs. Kansas, 123 U. S. 623,* is much more nearly so, as that was a case of the exercise of the police power for the protection of the health and morals of the citizen.

This and the cases with which I shall follow it, were cases where under various clauses of the constitution of the United States defences were interposed against the exercise of the police power of the State. If not sustainable under other clauses of the constitution they would not be under the interstate commerce clause, as they all enforce the paramount right of the State in the exercise of these extensive and elastic powers.

Mugler vs. Kansas was the case of a claim of parties having large sums invested in breweries, etc., to recover for the value of their property destroyed or made valueless by the prohibitory liquor law of Kansas. It was claimed that it infringed rights and immunities of citizens secured by the constitution of the United States and that clause of the constitution prohibiting the taking of property for public use without compensation.

The court quoting with approval from the various opinions in the license cases lays down principles which are fully applicable to the case at bar. It is to be remembered that the question involved in the license cases was whether the clause conferring on congress the right to regulate commerce was infringed, but the court treated these principles as equally applicable where any other clause of the constitution was invoked.

They say, quoting from Chief Justice Taney:

"If any State deems the retail and internal traffic in ardent spirits injurious, and calculated to produce idleness, vice and debauchery, I see nothing in the constitution of the United States to prevent it from regulating or restraining the traffic, or from prohibiting it altogether if it deem proper."

And from Justice McLean:

"A State regulates its domestic commerce, conducts the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare; over those subjects the federal government has no power. The acknowledged police power of a State extends often to the destruction of property; a nuisance may be abated, everything prejudical to the health or morals of a city may be removed."

And from Judge Woodbury:

"How can they (the States) be sovereign within their respective spheres without power to regulate their internal commerce, as well as police, and direct how, when and where it shall be conducted, in articles intimately connected with the public morals or public safety or the public prosperity."

And from Judge Greer:

"The true question presented by these cases and one which I am not disposed to evade, is whether the States have the right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects and the cause of disease, pauperism and crime. Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint or prevention of crime, for the preservation of the public peace, health or morals, must come within this category."

The court then proceeds to say:

"Power to determine such questions so as to bind all must exist somewhere. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to

execute what are known as the police powers of the State and to determine permanently what measures are appropriate or needful for the protection of the public health, public morals and public safety. While every possible presumption is to be indulged in in favor of the validity of a statute, if a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable evasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby to give effect to the constitution."

And this is the whole case in a nutshell. This court should indulge in every possible presumption in favor of this meat inspection law, but having done so, if in the language of the supreme court in *Powers vs. Pennsylvania, 127 U. S.*, from facts apparent upon the face of the bill, or of which it can take judicial cognizance, this enactment has no real or substantial relation to the public health or is a palpable evasion of rights secured by the fundumental law, then it cannot be sustained as a proper exercise of the police power.

If the court were to listen to the assertions of foreign packers, they might suppose that the main purpose of the law was to protect Minnesota butchers against foreign competition. Doubtless these industries will be greatly benefitted and promoted by this act, if valid.

But as the Supreme Court of Minnesota said in *Butler vs. Chambers, 36 Minn. 73*, "if there were such grounds (viz., protection of the public health), it is no objection that a legitimate industry is incidentally benefitted as the practical result of the operation of the statute."

But in support of this law, in addition to the presumption which attaches to the law, is the fact, of which the court will take judicial cognizance as a matter of common knowledge, that the diseases known as Texas fever, pleuro-pneumonia, or cancerous swellings of the jaws, can only be detected by the symptoms present in the living subject, and not by an examination of a limb after death, detached from the body.

I cannot see any room for the court to say that this law has no relation to the public health.

In the case of *Mugler vs. Kansas, 123 U. S.*, the court also said, in regard to the clauses of the federal constitution invoked, "a prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community, cannot, in any just sense, be termed a taking or appropriation of property for the public benefit."

In *Beer Co. vs. Massachusetts, 97 U. S. 32*, where it was claimed that an exercise of the police power infringed the clause of the constitution prohibiting a State from impairing the obligations of contracts, it was held that "if the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

In that case the legislature had chartered the Beer Company for the manufacture of malt liquors, and it was claimed that this contract could not be impaired by a subsequent prohibitory law; but the court said "the legislature cannot, by any contract, divest itself of the power to provide for the health of

the citizens. They belong emphatically to that class of objects which demand the application of the maxim: *Salus populi est suprema lex.*

In *Fertilizing Co. vs. Hyde Park, 97 U. S. 659,* the charter of the Fertilizing Co. authorized it to establish chemical works for the purpose of manufacturing dead animals into an agricultural fertilizer. It had invested large capital and established expensive works in the vicinity of Hyde Park, after which the municipality passed an ordinance prohibiting the transaction or carrying on of such business. The company defended on the ground that the ordinance infringed the clause of the constitution prohibiting the passage of any law by a State impairing the obligation of contracts.

The court said: "We cannot doubt that the police power of the State was ample and adequate to give effectual remedy. That power belonged to the States when the constitution was adopted. They did not surrender it and they all have it now. It extends to the entire property and business within the local jurisdiction."

In the slaughter house cases, *16 Wal. 36,* an act absolutely prohibited the slaughter of any cattle in the city of New Orleans, except at the yards of a company on whom it conferred the exclusive privilege of conducting and carrying on the live stock, rendering and slaughter house business, and it was assailed upon the ground that it infringed the fourteenth amendment of the constitution, in that it abridged the privileges and immunities of citizens of the United States.

But the court sustained it, saying: "The regulation of the place and manner of conducting the slaughter-

ing of animals, and the business of butchering within a city, *and the inspection of the animals to be killed for meat*, and of the meat afterwards, are among the most necessary and frequent exercises of the police powers."

But afterwards rights of a similar character were granted to the Butchers' Union Slaughter House Company, and the Crescent City Company, on whom the monopoly, upheld in *16 Wallace*, was conferred, brought suit to enjoin them on the ground that the act construed in that case had conferred upon them exclusive privlleges. (*Butchers' Union Co. vs. Crescent City Co., 111 U. S. 746.*)

The court said: "The power was placed by the court in the slaughter house cases, *16th of Wallace*, expressly on the ground that it was the exercise of the police power which had remained with the States on the formation of the original constitution of the United States, and had not been taken away by the amendments adopted since."

It was claimed that the act conferring slaughtering and rendering franchises on the Butchers' Union Co. violated the clause of the constitution prohibiting the passage by a State of any law impairing the obligation of a contract.

"In regard to two subjects contained in the police power said the court, the legislature cannot by any contract limit the exercise of these powers to the prejudice of the general welfare, these are the public health and the public morals," and the police power was sustained.

In *Powell vs. Pennsylvania, 127 U. S.*, cited *ante*, the court sustained the oleomargarine law of Pennsylvania against the objection that it violated the four-

teenth amendment to the constitution by absolutely prohibiting the sale of an article of commerce, and held that in the exercise of the police power it was competent for the legislature to prohibit the sale of any article which it deemed dangerous to the health of the people.

The case of *Henderson vs. Mayor of N. Y., 92 U. S. 259*, which held void as being a regulation of foreign commerce a statute of New York regulating the landing of emigrants, like the Bowman case and the case of *R. R. Co. vs. Husen*, was the case of an attempted exercise of the police powers of the State extra-territorially.

The court said: "The effective operations of the law commence at the other end of the voyage. The master requires of the passenger, before he is admitted on board, as a part of the passage money, the sum which he knows he must pay for the privilege of landing him in New York. The law which gives the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans and San Francisco."

While the police powers of a State must be exercised within her borders, yet there is a class of laws which, while for the protection of the public health and therefore police powers, are also in some sense regulations of commerce—these, so long as they do not conflict with any positive law of congress, have been sustained from the earliest days of the government. Quarantine laws are laws of this character, and every State has the right to adopt such measures as its legislature deems wise for the protection of its citizens against the importation of infectious diseases.

Morgan vs. Louisiana, 118 U. S. 455.

I have discussed this question in the light of the various authorities and principles which are usually relied upon in support of the contention against the validity of such measures; but I come back to the impregnable and unassailable foundations on which this legislation rests, which no decisions have ever attempted to overthrow, and which is untouched by any of the decisions against State legislation hereinbefore examined, viz., that whatever the State deems it necessary to do within her own borders for the protection of the health of the citizen, she may constitutionally do under the primal and paramount law of self-protection, which is nature's earliest enactment, and to which no human legislation ever ran counter.

Subject to this only qualification that from facts apparent on the face of the law, or of which the court may take judicial cognizance, the cogent presumptions in its favor are not overthrown by bad faith in its enactment.

The court, I think, will take judicial notice that the amputation of the leg of a man sick of a fever, and its inspection by a physician who has never seen the living patient, would fail to reveal the real disease to any but the disciples of the occult sciences.

The dressed hind quarters of an ox will not be likely to reveal the lumps on his jaw or the tubercles in his lungs.

Discrimination between healthy and unhealthy animals must doubtless be made when such discrimination is possible; but the quarantine authorities need not, I trust, stop to sort a cargo of rags shipped from Memphis or Jacksonville in a yellow fever season in the endeavor to separate the infected threads.

Quarantine laws protect the public health by the adoption of such measures as are necessary to detect the presence of infection, although they impede the current of commerce. Inspection laws upon no different principle protect the public health by the adoption of such measures of inspection as are necessary to detect the presence of disease. Discrimination between domestic and foreign commerce may indubitably be made in both if necessary to accomplish that purpose.

I also refer the court to the decision of the Supreme Court of Minnesota in *Butler vs. Chambers, 36 Minn. 69*,—the oleomargarine case, where that court sustained a law absolutely prohibiting the sale of that article in Minnesota by citizens of any State, whether wholesome or unwholesome.

The court say:

"It cannot be necessary at this stage in view of the numerous decisions of the State and federal courts, to enter into any elaborate discussion to show that the legislature may exercise such powers (viz., of absolute prohibition of the manufacture and sale of any article deemed dangerous to the public health) as respects the right or liberty of the citizen to engage in business and conduct industrial pursuits. These privileges are to be enjoyed in subordination to the general public welfare and all reasonable regulations for the preservation and promotion thereof.

"The State is not sovereign without the power to regulate all its internal commerce as well as police. It is a bold assertion at this day that there is anything in the State or United States constitutions conflicting with or setting bounds upon the legislative discretion

or action, indicating how, when and where a trade shall be conducted in articles intimately connected with the public morals, public safety or public prosperity, or even to prohibit or suppress such traffic altogether, if deemed essential to effect those great ends of good government. (Quoting *Metropolitan Board of Excise vs. Barnes, 34 N. Y. 657-666.*)

"It is also well settled that such laws are not invalid because in conflict with the power of congress over commerce.

"In the license cases, *5 How. 504, 577,* it is said: A State is not bound to furnish a market for imported goods nor to abstain from the passage of any law which it may deem necessary to guard the health or morals of its citizens.

"And so in *Bartemeyer vs. Iowa, 18 Wall. 129,* it was held that such legislation was not in conflict with the fourteenth amendment of the constitution."

To the argument that the object of the statute was to prohibit one industry to foster another, the court said:

"This assumes that the object of the legislation was for the benefit of a class, and that there was no reasonable ground for the exercise of the police power, because if there were such grounds it is no objection that a legitimate industry is incidentally benefited as the practical result of the operation of the statute. We do not think the court would be warranted in setting aside this legislation on such grounds."

As said by the court in *People vs. Allerton, 55 N. Y. 50:* "Courts do not sit in the review of the discretion of the legislature, or determine upon the expediency, wisdom or propriety of legislative action in matters within the power of the legislature; every

intendment is in favor of the validity of a statute, and no motive, purpose or intent can be imputed to the legislature in the enactment of a law other than such as are apparent on its face and to be gathered from the terms of the law itself."

The federal constitution contains many grants of power to congress and many restrictions on States, all of equal authority and all absolutely and literally upheld by the courts except as against the police powers of the State exercised within her own borders, to which all must yield, viz.:

1. No State shall pass any law impairing the obligation of contracts. Such laws are void except as against the police power before which the constitutional prohibition yields. (*Beer Co. vs. Massachusetts; Hyde Park vs. Fertilizing Co; Butchers' Union Co. vs. Crescent City Co., cited ante.*)

2. The citizens of the several States shall enjoy the privileges and immunities of citizens in the several States; but the citizen of New York, while he may import, cannot sell a pound of oleomargarine in Pennsylvania, because in the exercise of the police powers the latter State has absolutely prohibited its sale. (*Powell vs. Pennsylvania, cited ante.*)

3. Congress has power to pass laws to promote the progress of science and the useful arts, and granting exclusive privileges to inventors; but a citizen of New York who has a patent for an illuminating oil cannot sell it in Kentucky because in the exercise of the police power for the protection of the lives of her citizens she has absolutely prohibited its sale. (*Patterson vs. Kentucky, cited ante.*)

4. Property cannot be taken for public use without just compensation; but the citizen of New York owning a brewery in Kansas can neither use it nor recover for its destruction by the exercise of the police power of the State declaring that beer shall neither be manufactured nor sold. (*Mugler vs. Kansas, cited ante.*)

5. Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes; but the State may pass laws prohibiting the sale of infected goods or diseased meats, and may adopt suitable means to ascertain if they are infected or diseased. She may even prohibit their importation. (*Bowman vs. R'y Co., cited ante.*)

Whence comes the peculiar omnipotence of the commercial clause to strike down the police power of the State which confessedly does not exist in regard to the other clauses of the constitution? Not from the letter of the constitution, nor from the decisions of the courts. Indeed, in *Patterson vs. Kentucky* the court relied upon the principles which it said it had often held as to the commerce clause.

The decisions on the circuits of Judges Blodgett and Nelson have, with scant courtesy towards the legislatures of the States, assumed without proof that a fraud was intended and perpetrated on the constitution; this court will, as it always has done, presume good faith and sustain a law which apparently has relation to the public health.

It has been said that the law in question does not allude to the public health except in its title, which is a mere subterfuge. This kind of statement is both shallow and untrue.

It is true the title declares it to be intended for the protection of the public health by providing for a certain kind of inspection, but its provisions proceed to carry out its professed intention in detail.

Section two provides for the appointment of inspectors by the several *local boards of health*.

Section three makes it the duty of the inspectors to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions within twenty-four hours before slaughter, and *if found healthy and in suitable condition for human food* to issue a certificate to that effect.

If found unfit for food by reason of infectious disease the animal shall be destroyed.

Section four provides the penalty for the sale for *human food* in this State of any fresh beef, etc., which has not been taken from an animal inspected and certified before slaughter by inspectors appointed under the act.

Section five prescribes the form of certificate, and which shall state that the animal was at the date of inspection *free from all indication of disease, apparently in good health and in fit condition to be slaughtered for human food*.

These clauses afford a sufficient answer to such loose statements.

It has also been said that a precisely similar law was presented to the legislature of every State in the Union, and defeated in all but Colorado, Indiana and Minnesota, and in the two former States has been declared unconstitutional.

If such a law was presented in other States and defeated in the legislature, the question whether it was because of the legislature's opinion of its uncon-

stitutionality or of the presence of a powerful lobby representing the most colossal monopoly, perhaps, that any government was ever confronted with, might prove interesting if not legitimate in a legal discussion. But I think it is not true that a precisely similar law was presented in other States or has been decided unconstitutional by the courts of Colorado or Indiana. I have not seen the laws of those States, but several such proposed laws were before the framers of the Minnesota law and were all discarded, and the law framed with an earnest purpose to conform it to the principles repeatedly held by this court.

The sole argument upon which the law has been held unconstitutional on the circuit by the District Judges of Minnesota and Illinois has been that dressed meat is an article of commerce. All wholesome animal products are articles of commerce. Oleomargarine is an animal product, yet, although it can be shown to be manufactured from pure animal fats, the court will not listen to the proof but will presume the legislature to have been governed by honest intentions in prohibiting its sale, and will uphold such prohibition; nor will the fact that it was manufactured in and imported from another State justify its sale against such legislative interdiction. While dressed meat, if a State can be assured of its wholesomeness, may be an article of commerce, yet it is more accurate to say that animal food is an article of commerce, but the form in which it may cross the borders of the State or be sold by the importer must depend upon the necessity of the case.

Every civilized nation has adopted inspection laws not unlike, in their general purport, the law under consideration. The freedom from certain diseases

whose ravages have been frightful among all other races, with which the Jewish race is accredited, is said by medical authority to be due to the rigid system of inspection of all animals designed for slaughter for human food.

If the protection of health cannot be adequately afforded to the citizens of a State without inspection of animals in life, then *dressed meat* cannot be said to be an article of commerce which is exempt from the operation of the police powers, and the State, as incident to such power, may say that animal food in that form shall not be imported and sold, but shall only be admitted in such form as will admit of the application of all necessary tests, just as quarantine laws may forbid the entrance of persons or merchandise until subjected to sufficient tests to insure the public against the propagation of disease. But the law imposes no restriction on importation, but simply prohibits sale within the State without previous inspection.

I sum up the argument thus:

1st. If inspection in life is necessary to detect disease, it may be required by State legislation, although it may incidentally affect commerce.

2d. If the legislature deem such inspection necessary, and manifest such an opinion by an enactment requiring it, the presumptions which surround a legislative enactment must sustain it, unless it manifestly on its face has no relation to its professed object.

3d. No evidence can be received in support of or opposition to the law, as was held in *Powell vs. Pennsylvania;* but if such evidence was competent, the burden of proof is not on those seeking to sustain the law, to show the necessity of inspection in life to detect disease, but upon those who would overthrow it, to show

the inadequacy of such inspection, or that the inspection of dressed meats would serve the same purpose.

The party who stands upon presumptions is not required in the first instance to support them by evidence.

A powerful combine has thrown its gauntlet at the sovereignty of the States and is engaged in a grand duello with both State and nation. Shall the right of self preservation never yet denied to the States by the most rabid advocate of federal supremacy yield to the selfish greed of a gigantic, moneyed interest, and their power to adopt such measures as are necessary to detect danger be swept away because commerce in an article in a particutar form may be affected thereby, is the question I herewith submit for decision.

GORDON E. COLE,
Of Counsel for State of Minnesota,
Appellant.

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Supreme Court of the United States.

In the Matter of the Application of Henry E. Barber for a Writ of Habeas Corpus.

STATE OF MINNESOTA,
Appellant,

vs.

HENRY E. BARBER,
Respondent.

Supplementary Citations of Appellant.

By GORDON E. COLE.
Attorney for State of Minnesota.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

Supreme Court of the United States.

STATE OF MINNESOTA,

Appellant,

vs.

HENRY E. BARBER,

Respondent.

SUPPLEMENTARY CITATIONS OF APPELLANT.

In *Morgan vs. Louisiana, 118 U. S. 462*, the Court said (Judge Miller):

"The danger comes from you, and though it may turn out that in your case there is no danger, yet as you belong to a class from which all this kind of injury comes, you must pay for an examination which distinguishes you from others of that class."

In *New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 667*, the distinction was made between the right under the police power to repeal contracts on other grounds, and on grounds of health and morals—the court saying, quoting from *Stone vs. Mississippi:*

"No legislators can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of

both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

And quoting from case of *Butchers' Union vs. Crescent City Co.*, they say: "So far from the court saying that the State could not make a valid contract in reference to any matter whatever within the reach of the police power, according to its largest definition its language was: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think, in regard to two subjects, it cannot by contract limit the exercise of those powers to the prejudice of the general welfare. *They are the public health and the public morals.*" Page 668.

The principle upon which the decisions in *Beer Co. vs. Massachusetts*, *Fertilizing Co. vs. Hyde Park*, *Stone vs. Mississippi*, and *Butchers' Union vs. Crescent City Live Stock Landing Co.*, rest, is that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals." Page 669.

In *Butchers' Union Co. vs. Crescent City Landing Co.*, *111 U. S. 754*, Mr. Justice Field, concurring in the judgment, said "no one of the judges who disagreed with the majority in the Slaughter-house Cases denied that the States possessed the fullest power ever claimed by the most earnest advocate of their reserved

rights—to prescribe regulations affecting the health, the good order, the morals, the peace, and the safety of society within their respective limits. When such regulations do not conflict with any constitutional inhibition or natural right, their validity cannot be successfully controverted. The general government was not formed to interfere with or control them. No aid was required from any external authority for their enforcement. It was only for matters which concerned all the States and which could not be effectually or advantageously managed separately that a general and common government was desired; and the recent amendments to the constitution have not changed nor diminished these previously existing powers to legislate respecting the public health and the public morals. But though this power rests with them, it cannot be admitted that under the pretence of providing for the public health or the public morals, they can encroach upon rights which those amendments declare shall not be impaired.

The act of Louisiana required that the slaughtering of cattle and the preparation of animal food for market should be done outside of the limits of the city of New Orleans. It was competent to make this requirement, and *furthermore, to direct that the animals before being slaughtered should be inspected in order to determine whether they were in a fit condition to be prepared for food. The dissenting judges in the slaughter house case found no fault with those provisions, but on the contrary approved of them. Had the act been limited to them there would have been no dissent from the opinion of the majority."*

In the case of the *City of New York vs. Miln, 11 Peters, 102-133*, where a master of a ship was re-

quired to make a report within twenty-four hours after arrival "to the mayor, of the name, place of birth, age, occupation and last legal residence of every passenger, under a penalty for no report or for a false report, the court said:

"The simple inquiry is whether by the constitution the power to pass this law was taken from the States and granted to Congress, for if it were not it still remains with them. If, as we think, it be a regulation, not of commerce but of police, then it is not taken from the States.

"We choose to plant ourselves upon what we consider impregnable positions. That the State has the same unlimited and undeniable jurisdiction over all persons or things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States, that all those powers which relate to merely municipal regulation, or what may more properly be termed internal police regulation, are not thus surrendered or restrained, and that consequently in relation to those the power of a State is complete, unqualified and exclusive."

Comparing the power there exercised to the police power the court said:

"The power to pass inspection laws involves the right to examine articles which are imported and are therefore directly the subject of commerce, and if any of them are found to be unsound or infectious, to cause them to be removed or even destroyed. But the power to pass these inspection laws is itself a branch of the general power to regulate internal police. Again, the power to pass quarantine laws operates on the ship which arrives, the goods

which it brings, and all persons in it, whether the officers and crew or the passengers. Now, the officers and crew are the agents of navigation, the ship is an instrument of it, and the cargo on board is the subject of commerce, and yet it is admitted that this power remains with the States.

"We think it unnecessary to pursue the comparison further because we think, if the stronger powers, under the necessity of the case, by inspection and quarantine laws, to delay the landing of a ship and cargo which are the subjects of commerce and navigation, and to remove or even destroy unsound and infectious articles, also the subject of commerce, can be rightfully exercised, that it must follow as a consequence that powers less strong, such as the one now in question, is still more clearly embraced in the general power of the States to regulate their own internal commerce."

The case of *Brown vs. Maryland*, already repeatedly referred to, was the case of a tax on imports—it imposed a license fee on the sales of imports—and so was in conflict with that clause of the constitution which declares that "no State shall without consent of congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

The decision does not apply, as held in *Woodruff vs. Parham, 8 Wallace*, to interstate commerce; but if it had done so, Chief Justice Marshall expressly excepts a case like the one at bar from its operation.

Answering the objections of counsel: He says "the power to direct the removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain in the States. We are not sure that

this may not be classed among inspection laws. The removal or destruction of unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed the laws of the United States expressly sanction the health laws of the States."

12 Wheat. 419-444.

A careful examination of the majority opinion in the *Bowman Case, 125 U. S. 465*, would seem to indicate that it may be regarded as the settled doctrine of the court that in matters affecting the public health or morals, the State may absolutely prohibit the sale of any article within her own borders, although recently brought there from another State, and still in the hands of the importer, the act of transportation having terminated, for they say that in one of the cases reported as the "*License Cases:*"

"The statute of New Hampshire applied to intoxicating liquor imported from another State, and the decision in that case upheld its validity in reference to the disposition by sale or otherwise of the intoxicating liquor after it had been brought into the State."

125 U. S. 476.

And it appears from the review of the opinions of the judges in that case that the judges in the *License Cases* all concurred in that opinion (p. 477), and they make the distinction between the case they were deciding and the *New Hampshire License Case, 5 How.* thus:

"It (the law) does not act upon the *business* through the *local instruments to be employed after coming within the State*, but directly upon the business as it comes into the State from without or goes

out from within," (p. 486, quoting from a previous decision of the court.)

"It is not an exercise of the jurisdiction of the State over persons and property within its limits, on the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States."

The case of *Walling vs. Michigan, 115 U. S.*, already referred to, held the Michigan law void, not merely on the ground that it discriminated against non-residents, but because it taxed the business of a non-resident dealer soliciting in Michigan, sales of intoxicating liquors.

And these cases indicate the salient distinction.

The Iowa law acted on the carrier, and prohibited his bringing liquor into the State.

The Minnesota law, while not interferring with importation, acts upon property within its limits after its transit has ceased. The distinction may be further illustrated.

A good illustration is found in the case of *LeLoup vs. Port of Mobile, 127 U. S. 640*, holding void a law imposing a license tax upon telegraph companies doing business and transmitting messages through different States, but the court said:

"We may here repeat what we have so often said before, that this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the poperty of those engaged in such commerce located within the State, as the property of other citizens is taxed, nor from regulating matters of local concern, such as wharfage, pilotage, etc."

In *Munn vs. Illinois, 94 U. S. 113*, the power of the State of Illinois to regulate the charges of the grain elevators of Chicago, through which the great grain trade of the northwestern wheat growing States passed to eastern and European markets, was upheld, although wheat in transit from other States might thereby be taxed, but it was a matter of internal concern.

In *Brown vs. Houston, 114 U. S. 622*, it was held that coal mined in Pennsylvania and shipped to New Orleans to be sold in open market, becomes intermingled, on arrival, with the general property of the State, and subject to taxation under general laws, although it has not been landed from the vessel, and is sold to be reshipped for a foreign port.

The court said the tax was not a tax imposed while the coal was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination—and had come to a place of rest.

The coal was taxed before it was sold by the importer; the prohibition of sale of dressed meat in Minnesota without inspection acts under precisely the same conditions.

The court in that case said the coal had become a part of the general mass of property in the State.

As we insist, the meat in this case had come to a place of rest in the St. Paul markets; the act of transportation had ceased, and it was subject to the laws of the State.

The New Hampshire case in the *License Cases, 5 How.*, supports by a unanimous opinion the power of a State absolutely to prohibit the sale of an article deemed dangerous to the public health after it has

reached a place of rest, although it was imported from another State and is in the hands of the importer in the original package, which is stronger than the case at bar, and the majority of this court in the *Bowman Case* say that that question was a different one from the one in the *Bowman Case*. They say "the right to bring it within the State was not questioned, and the reason which justified the right to prohibit sales admitted by implication the right to introduce intoxicating liquor as merchandise from foreign countries or from other States of the Union free from the control of the several States, and subject to the exclusive power of congress."

This is conceived to be the exact attitude of the case at bar, and the precise character of the law under investigation.

GORDON E. COLE,
Attorney for State of Minnesota.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 1346.

THE STATE OF MINNESOTA,
Appellant,

vs.

HENRY E. BARBER,
Appellee.

Appeal from the Circuit Court of the United States for the District of Minnesota.

ARGUMENT FOR APPELLEE.

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THE STATE OF MINNESOTA,
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Appeal from the Circuit Court of United States for the District of Minnesota.

ARGUMENT FOR APPELLEE.

A statement of the facts has been made by Mr. Sanborn, and it is not necessary to repeat. A copy of the Minnesota act, the validity of which is challenged, is printed in his argument.

The effect of the act of the Minnesota legislature is to prohibit the sale of any fresh beef, veal, mutton, lamb or pork for human food in that state, brought from other states, although it does not in terms make such a prohibition. The act makes unlawful a sale or offer for sale of any such meats for food unless taken from an animal inspected by a local inspector within twenty-four hours before the animal is slaughtered. It is possible that an

animal might be taken from an adjoining state for a short distance, inspected, carried back and slaughtered in another state within that time; but it would be barely possible. It would be impossible to take an animal from Chicago, where Armour & Co. are engaged in slaughtering, to Minnesota, where an inspection could be made, and returned to Chicago for slaughter within the twenty-four hours named in the statute, and then carry the beef back to Minnesota for sale.

The act does not in terms prohibit the transportation of fresh meats into the state, but it does in express terms prohibit the sale for human food, unless the terms of the act have been complied with in regard to inspection. The practical operation must be to prevent the sale of fresh beef, veal, mutton, lamb or pork in the State of Minnesota which is taken from animals slaughtered in other states, and transported into the State of Minnesota for the purpose of sale. There is no provision for the inspection of such meats in the State of Minnesota other than an inspection of the animal alive. The meats may be sound, healthful and fit for food in every respect, and yet it becomes unlawful to sell them in the State of Minnesota. If the act had made reasonable provision for the inspection of meats before the same were offered for sale, with the view of rejecting that which was unfit for food, such an act would be properly an inspection law. But this act of legislation makes no discrimination between diseased and healthy meats. It prohibits the sale of all alike unless the animal has been inspected upon the hoof within the State of Minnesota by a person appointed for that purpose by local boards in the several cities, villages, boroughs and townships within the state.

The court will take judicial knowlege of certain facts.

Beef, veal, mutton, lamb and pork are staple articles of food and are used as such in all civilized countries. Trade in these articles and transportation of them is commerce. Methods have been devised for keeping such meats fresh for long periods of time after the animal has been slaughtered. Modern enterprise has provided modes of transportation in boats and cars by which the meats can be kept in proper condition for food while being transported for long distances. Large slaughtering houses and yards have been established in Chicago, Kansas City, Omaha and other points in the north-west, near the sections of country where the stock is raised and fitted for slaughter. Such houses produce large quantities of dressed meats which are carried to all points in the United States and Canada, and also to the different countries of Europe, where they are sold as fresh meats for food in the market. These are facts which the court will take notice of without proof.

It appears from the statistics of the commerce of the country that 135,737,401 pounds of fresh beef were exported from the United States during one year ending on the 1st of July last, the product of about 170,000 head of cattle, while 194,557 head of live cattle were exported. During the year 1888 the shipments of fresh dressed beef from Chicago alone were 922,235,274 pounds, and the number of cattle killed in Chicago in 1888 was 1,868,521.

This business is not confined to the United States. Animals are slaughtered in large establishments in the different countries of South America, and the meats are carried in refrigerator apartments of vessels and sold in Europe. It has become an indispensable branch of traffic in the civilized world.

The transportation and sale of dressed beef, veal, mut-

ton, lamb and pork are important articles of commerce, and when such transportation is carried on between a point in one state and a point in another state for the purpose of sale at the place of destination, they constitute articles of commerce within the meaning of the constitution "among the several states." It is conceded that when such meats become putrescent, or are diseased so as to be unmarketable and unfit for human food, that they do not constitute articles of commerce, but so long as the meats are sound, fresh, healthy and fit for food they are articles of commerce. No declaration of a legislature can take them from the list of articles belonging to commerce; that is a matter to be determined by the customs and usages of the commercial world. It is not within the power of a state legislature to defeat the grant made by the states to the national government by a declaration as to what shall or shall not be subjects of commerce.

The state, through its legislature, may, by suitable inspection laws, provide against the sale of adulterated, diseased or unhealthful articles to be used for food, as a sanitary measure; but such provisions must be reasonable in themselves, operate justly upon all, and cannot be made the pretext for interfering with commerce.

The state authorities may make police regulations for the purpose of protecting the lives, health and morals of the community, and to promote domestic order, but such laws must be limited in operation to persons and property within the limits of the state. They cannot be applied to territory outside of such limits. They cannot be used as a guise for the enactment of rules which conflict with the powers confided to the federal government. *More, the state cannot exert its authority under the right to enact police regulations or inspection laws, upon subjects which*

are confided by the constitution of the United States to the general government, except by the consent of Congress.

In this case, it is not necessary that the court should hold the act absolutely void. It may be a valid law, and binding upon the inhabitants and property of the State of Minnesota. The contention is, on the part of the appellee, that the act cannot apply to sound dressed meats taken from animals slaughtered in the State of Illinois, and carried to points within the State of Minnesota, and there sold for human food. The operation of the act is limited by the third clause of Sec. 8, Art. 1, of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; and by the first clause of Sec. 2, Art. 4, which provides, "the citizens of each state shall be entitled to all the privileges and immunities of the several states."

1.

THE GRANT TO CONGRESS OF THE POWER TO REGULATE COMMERCE IS WITHOUT LIMITATION OR RESERVATION.

It is contended that the right of a state to enact police regulations, or adopt inspection laws, is reserved to the states by the tenth amendment to the constitution. Expressions to that effect have been made in different decisions of this court, but it has not been held that the exercise of such power by the states is without limitation, or the power of the national government to restrain it. On the contrary, there are numerous decisions in which

it has been expressly held that a state cannot enact laws which collide with the authority of Congress to regulate commerce with foreign nations, among the several states, and with the Indian tribes.

One of the earliest expressions in regard to reserving police powers by the state is to be found in *Brown* v. *Maryland*, 12 Wheat., 419. In that case a state law required an importer to take a license and pay fifty dollars before he should be permitted to sell a package of imported goods, and it was held that such a provision was in conflict with the constitution of the United States, which prohibited any state from laying an impost and also with the commercial clause. Having so decided, Chief Justice MARSHALL said (p. 448):

"It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its own territory.

"We admit this power to be sacred, but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the states may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable in the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments as a vital principle of perpetual operation. It results necessarily, from this principle, that the taxing power of the states must have some limits. It cannot

reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce."

In *Henderson* v. *Mayor, etc.*, 92 U. S., 259, Mr. Justice MILLER, in discussing the boundaries of the police power, said (p. 271):

"Whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to use it, in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the constitution."

* * * * *

"It is clear from the nature of our complex form of government, that whenever a statute of a state invades the domain of the legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, nor how closely allied to powers conceded to belong to the states."

In *Walling* v. *Michigan*, 116 U. S., 449, the court, speaking of the claim that the act in question was a proper exercise of the police power of the state for the discouragement of the use of intoxicating liquors, said:

"This would be a perfect justification of the act if it did not discriminate against the citizens and products of other states in a matter of commerce between the states, and thus usurp one of the prerogatives of the national

legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby."

In *Bowman* v. *C. & N. W. Ry. Co.*, 125 U. S., 489, Mr. Justice Matthews quotes with approval from the opinion of Mr. Justice Catron in the License Cases, 5 How., 599, speaking of the police power as reserved to the states and the power granted to Congress over commerce, and dissenting from the decision that the law was a proper exercise of police authority, says:

"If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress and leaves with the states, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food

and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food or clothing.'

In *Brown* v. *Houston*, 114, U. S., 630, it was declared that the power over commerce "is certainly so far exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states, coming or brought within its jurisdiction."

It is true that the Supreme court has, in several opinions said that the power to make police regulations, pass inspection laws, and establish quarantine rules, are among the powers reserved to the states, but these expressions are mostly found in cases where the particular statute considered was held void, and such remarks were not necessary to the decision of the case in hand. In none of these cases were the powers expressly granted to Congress under consideration. Whenever the commercial clause or other express grant has been discussed, it has been held that the states could not enact a statute in the exercise of police power which interfered with the authority conferred by the constitution.

An apparent exception exists in the cases where state statutes touching commerce have been sustained because Congress had not acted on that subject. Some confusion prevailed for a time in regard to the particular matters in regard to which the state might legislate in the absence

of action by Congress. The cases, first decided, related to bridges and harbors which had a definite location.

In the so-called Granger cases, reported in 94 U. S., the court made use of expressions which justified the application of the rule to matters not strictly local in their character. The court, however, has drawn the line distinctly, and it is a settled rule that where the subject-matter is one in regard to which general rules can be made to apply, the states cannot act, but the non-action of Congress is considered as equivalent to a declaration that no rules shall be adopted and commerce remain free.

This subject was again maturely considered by the Supreme court in *Bowman* v. *C. & N. W. Ry. Co.*, 125 U. S., 480–499, where the opinion was delivered by Mr. Justice Matthews. It was there distinctly asserted that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, Congress alone can legislate, and every act of the legislature is void.

It is important to remember that all cases of this kind were decided before Congress had passed the existing laws regulating inter-state commerce. Congress has now indicated its purpose to establish rules for the regulation of commerce among the several states. The conclusion is, therefore, still stronger against the right of the states to make any rule upon a subject which is delegated by the constitution to the general government.

The statute of Minnesota relates to a subject, in regard to which general rules can be made. Assuming that the act applies at all to meats carried from another state to Minnesota, the traffic in fresh beef, veal, mutton, lamb and pork, to be used for human food, is very large, and, carried on between the various states and with foreign coun-

tries, there is no element of locality in it. The trade in such articles is clearly commerce, and when conducted by dealers in different states, is commerce among the several states, and of that nature which can be governed by general rules.

If sound and healthful fresh meats are articles of commerce, then it is not in the power of the legislature of Minnesota to make any regulation as to the sale of such articles brought into the state from another state.

Clause 3, section 8, article 1, which grants to Congress the power to regulate commerce, is not subject to the right of a state to pass inspection laws. The states are prohibited by clause 2, section 10, article 1, from laying imposts or duties on imports or exports "except what may be absolutely necessary for executing its inspection laws." There is no such qualification to the commercial clause; that is absolute and without limitation. The state is permitted to levy an impost or duty, but only so far as may bn absolutely necessary to aid proper inspection laws. But this authority is confined to imposts or duties, and does not relate to regulations of commerce.

The convention which framed the constitution saw proper to declare in express language that the right to make inspection laws was reserved when applied to imports. No such intention is exhibited in regard to the commercial clause. This indicates that the object was to confer full power upon Congress to regulate commerce. The claim that the Minnesota statute is to be sustained as an inspection law is not tenable because the subject-matter is not imports, where the states may enact such laws. The statute must be sustained, if at all, upon the ground that it is a proper police regulation, the power to make which has been retained by the state and with which Congress cannot interfere.

The counsel for the state broadly claims that the power exists in the state to enact any police regulation whatever, that the legislature is the exclusive judge as to the need of such regulation and of the measures necessary to be adopted. He places it upon the law of self-defense, or self-preservation. This is the doctrine asserted in the Virginia and Kentucky resolutions of 1798, which, being followed up, culminated in the late civil war. Whatever differences of opinion may have existed in regard to such principles, as applied to the union of these states, it has been supposed that they were definitely settled in that conflict.

Clause 2, section 2, article 6 of the constitution declares:

"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

This court has had occasion frequently to declare that in regard to the powers conferred upon Congress, its action is supreme. An act of Congress in the exercise of such powers is a law in pursuance of the constitution of the United States. Upon this class of subjects the national government is supreme. There can be no dispute as to the grant to Congress to regulate commerce among the several states, and any effort by a state to make regulations on this subject must necessarily give way to those made by the United States.

So in the license cases, 5 Howard, 588, it was said by Mr. Justice McLEAN:

"The federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them, nor inhibited to them. From this it is clear that while these supreme functions are exercised by the federal and state governments, within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the states are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government."

There are decisions of this court which have sustained laws of a state amounting to a regulation of bridges, harbors, etc., in the absence of express legislation by Congress, but it has now been definitely settled that on all subjects to which a general rule can be applied, the action of the state is null and void, regardless of the question whether Congress has acted or not.

II.

THE MINNESOTA STATUTE IS NOT A PROPER EXERCISE OF POLICE POWER, NOR A VALID INSPECTION LAW.

Admitting, for the purpose of the argument, that the states may pass statutes under the police powers reserved to the states, which will affect commerce, yet the statute in question is invalid. The courts will determine this question. The constitution and the laws passed in pur-

suance thereof, are the supreme laws of the land, and all state laws in conflict therewith are void. Courts have been created by the statutes of the United States whose decisions in regard to the powers of the federal government must necessarily control the states. There are repeated instances where this court has examined the statute of a state, and it has been held that the authority conferred upon Congress cannot be affected by a statute passed as a police or inspection law.

In *Railroad Co.* v. *Husen*, 95 U. S., 469, the court, speaking by Mr. Justice STRONG, says:

"It seems hardly necessary to argue at length, that, unless the statute can be justified as a legitimate exercise of the police power of the state, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of inter-state commerce, a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is inter-state than it can that which is with foreign nations. Power over one is given by the constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one state to another is a branch of inter-state commerce, is undeniable, and no attempt has been made in this case to deny it."

After citing other cases on the subject, the opinion proceeds (page 473):

"Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the state any Texas cattle

or Mexican cattle or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a state to enact. To hold otherwise, would be to ignore one of the leading objects which the constitution of the United States was designed to secure."

In *Hall* v. *DeCuir*, 95 U. S., 489, a statute of the State of Louisiana, which undertook to provide that there should be no discrimination between passengers on acconnt of color, was held to be void.

Chief Justice WAITE says, in delivering the opinion:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming into the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a less or greater degree those taken up and put down without. A passenger in the cabin set apart

for whites without the state, must, when the boat comes within, share the accommodation of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

Other cases in which that court has decided that statutes passed under the guise of police powers were invalid, are to be found in *Bowman* v. *C. & N. W. Ry. Co.*, 125 U. S., 479; *Henderson* v. *Mayor, etc.*, 92 U. S., 259; *Chy Lung* v. *Freeman, ib.*, 275; *Walling* v. *Michigan*, 119 U. S., 446, and *Robbins* v. *Shelby County Taxing District*, 120 U. S., 489.

In *Mugler* v. *Kansas*, 123 U. S., 623, it was said by the Supreme court of the United States: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty to look at the substance of things, whenever they enter upon the enquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purported to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution. * * * Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guar-

anteed by that instrument, or interfere with the execution of the powers confided to the general government."

In *Kimmish* v. *Ball*, 129 U. S., 217, a statute of Iowa was sustained. A comparison of that case with the Husen case reported in 95th U. S. will be profitable for the purpose of determining in what cases a police law of a state can be sustained.

The statute of Iowa provided when any person had in his possession any Texas cattle which had not been wintered north, he should be liable for any damages from allowing such cattle to run at large, and thereby spreading the disease. The statute related only to diseased Texas cattle within the state, which were allowed to run at large.

The court say, by Mr. Justice FIELD (page 221):

"Nor does the case of *Railroad Co.* v. *Husen*, 95 U. S., 465, upon which the defendant relies with apparent confidence, have any bearing upon the questions presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion. 'It is noticeable,' said the court, 'that the statute interposes a direct prohibition against the introduction into the state, of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not' (page 469). It interpreted the law of Missouri as saying to all transportation companies, 'You shall not bring into the state any Texas cattle or any Mexican cattle or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they do an

injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' (473.) Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. (Page 472.) No attempt was made to show that all Texas, Mexican or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the state by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised."

In the Husen case the effect of the law was to prohibit the bringing of Texas cattle into or through the State of Missouri without regard to whether they were diseased or not. In the Kimmish case the law operated upon Texas cattle which were diseased after they had been introduced into the state, and became a part of the property subject to the jurisdiction of the state authorities. The Iowa statute was not directed against sound Texas cattle, but only those which were unsound, and then it was only intended to protect other persons from the damages which might result from diseased cattle running at large.

If the Minnesota legislature had provided by law for the inspection of cattle or dressed meats after they had become a part of the mass of property in the state, and before the same should be offered for sale, such a law would have been valid, and within the proper police power of the state. But this statute, in effect, prevents traffic in dressed meats where the animals are slaughtered in another state, although meats may be free from disease, and healthful food. It falls within the condemnation of the principles announced by this court in several of its decided cases, which have already been cited. It is contended by counsel for the defendant that as the legislature of the state had the power to pass an inspection law, that its judgment as to the best means of accomplishing the end is conclusive, and not subject to judicial review. Reference is made to *Powell* v. *Pennsylvania*, 127 U. S., 678, to sustain this proposition. It is true, that it was held in that case that the statute of Pennsylvania was a legitimate exercise of the police power of the state for the protection of the health of the people; and that the means adopted by the legislature in prohibiting the manufacture and sale of any oleaginous substance, or any compound of the same other than that produced from unadulterated milk or the cream from the same, or any article designed to take the place of butter or cheese produced from pure, unadulterated milk or the cream from the same, in order to prevent the sale of what is commonly known as oleomargarine, could not be the subject of review by the court.

If Congress had passed the Minnesota law then the Powell case would have been in point, and the court might decline to consider the propriety or necessity of the legislation. If a federal court is precluded from in-

vestigating the real object of a state law, or is compelled to submit to the judgment of a state legislature on questions of fact, it would be in the power of a legislature of a state to disregard the provisions of the constitution of the United States and render them wholly inoperative.

In the Powell case it was not contended that the Pennsylvania act was repugnant to any provision of the constitution of the United States. There was no question of inter-state commerce involved. Powell was a citizen of Pennsylvania doing business in that state. The article in which he was dealing, apparently, was manufactured in the same state. The only question was as to the authority of the legislature to make police regulations with regard to its own inhabitants and with reference to property within the limits of the state. That case, therefore, has no application to the one now before the court.

Counsel for the state claims that this statute does not interfere with the regulation of commerce, because it does not prohibit the bringing of meats from other states, but only prevents the sale of them within the state. It seems to be admitted that the effect of this statute will be to prevent the transportation of the prohibited meats to the state for purposes of sale. It is claimed that consumers may do their marketing in Chicago and bring the provisions into the state, where they can be used, if not offered for sale. Reference is made to hotel-keepers, boarding-house proprietors and others who might avail themselves of this right because of the large quantities required for consumption. Yet this law is based upon the idea that it is necessary to preserve the health of the inhabitants of Minnesota by preventing the use of unwholesome meats. The counsel abandons to their fate the numerous class of people who live in boarding-houses

and hotels, limiting the effect of this beneficial law to the people who buy a roast or a steak for the next meal. This position is a substantial admission that this law is intended to evade the provisions of the Federal Constitution. There can be no reasonable doubt that the intent was, to exclude the dealers in dressed meats doing business in other states and to give a virtual monopoly of such articles by those engaged in a similar business in the State of Minnesota. It was intended to protect the raisers of cattle in that state from the competition with men engaged in the same business in other states. This court will not be prevented from an examination of the provisions of this law in connection with the circumstances, of which the court takes judicial knowledge for the purpose of determining whether this is a police regulation, enacted in good faith, or an effort to exclude commerce from other states.

When it is admitted that wholesome dressed meats are articles of commerce, that ends this case. If the law had prohibited the introduction of diseased cattle, or the meats coming from diseased animals, it would have been in the nature of a police regulation, but when all meats, without regard to whether they are healthy or unhealthy, are practically excluded from the state by a prohibition of sale, the statute advances beyond the limits of state police regulations.

III.

THE SALE OF MERCHANDISE CARRIED FROM ONE STATE INTO ANOTHER IS A PART OF COMMERCE AMONG THE SEVERAL STATES AND PROTECTED BY THE COMMERCIAL CLAUSE OF THE CONSTITUTION.

Counsel for the state contends that this law does not prevent the introduction into the state of the different kinds of meats mentioned in the statute, but only prohibits the sale. The question as to whether the importer has the right to sell the imported article within the country or state to which it is brought has been considered in a number of cases by this court. The cases where there have been expressions against the right to make the sale have arisen with regard to intoxicating liquors, it being conceded that the use and abuse of such liquors are productive of great evils to society, increasing crimes and the expenses of the government. Such cases cannot properly be quoted as authority in regard to articles of merchandise against which no such objections can be asserted. It was this particular traffic that produced expressions against the right to sell the imported liquors in the license cases, reported in 5th Howard, and in the dissenting opinions in the Bowman case, reported in 125 U. S. The very ground on which doubts were expressed in those cases upon the right to sell the liquor brought into the state free from the control of state authority was because of the inseparable connection between the right to import and the right to sell. Commerce consists not merely of the transportation of merchandise, but the right to sell and exchange it. If the latter privilege be taken away, there is no occasion to use the former. The number of

cases in which the consumer could bring goods from a foreign country or another state for his own use, as compared with those who are engaged in barter, would be insignificant. The rule should be established which would apply substantially to the traffic and trade of the country.

The rule upon this subject is well stated by Chief Justice MARSHALL in *Brown* v. *State of Maryland*, 12 Wheaton, 456, in which he says:

"If this power reaches the interior of the state and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation to be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

"If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed if an intent to

deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract? What does the importer purchase, if he does not purchase the privilege to sell?

"What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints, and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? Not how far will it be probably abused? The power claimed by the state is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

"We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

"If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property into the country,

must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation and principal object of it is, to prescribe the regular means for accomplishing that introduction and incorporation."

In the *Bowman* case Mr. Justice MATTHEWS says:

"But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation has terminated, because the sales which the state may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful in the execution of the policy of prohibition within the state, to extend the powers of the state beyond its territorial limits. But such extra territorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For if they belong to one state they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the constitution, by its delegations of national power, to prevent.

"It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where transit terminates, for the very purpose and motive of that branch of commerce, which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland*, 12 Wheaton, 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall,

that the conclusion would be the same in a case of commerce among the states. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or inter-state commerce, from the internal and domestic commerce of the state, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state."

125 U. S., 499.

Mr. Justice FIELD, in a concurring opinion, expresses himself at some length on the question of the right to sell an article imported. After reviewing the authorities upon this question, he says (page 504):

"That the right of importation carries with it the right to sell the article imported does not appear to me doubtful. Of course I am speaking of an article that is in a healthy condition, for when it has become putrescent or diseased it has ceased to be an article of commerce, and it may be destroyed or its use prohibited. To assert that, under the constitution of the United States, the importation of an article of commerce cannot be prohibited by the states, and yet to hold that when imported its use and sale can be prohibited, is to declare that the right which the constitution gives is a barren one, to be used only so far as the burden of transportation is concerned, and to be denied so far as any benefits from such transportation are sought. The framers of the constitution never intended that a right should not be fully enjoyed.

In *Brown* v. *Maryland*, 12 Wheat., 419, 446, Chief Justice Marshall, in delivering the opinion of the court, speaking of the commercial power of Congress, and after observing that it was co-extensive with the subject on which it acts, and cannot be stopped at the exterior boundary of a state but must enter its interior, said: 'If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. * * * The power claimed by the state is, in its nature, in conflict with that given to Congress, and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence. We think then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.' And the Chief Justice added: 'We suppose the principles laid down in

this case to apply equally to importations from a sister state.' (Page 449.)

"Assuming, therefore, as correct doctrine, that the right of importation carries the right to sell the article imported, the decision in the Kansas case may perhaps be reconciled with the one in this case by distinguishing the power of the state over property created within it, and its power over property imported—its power in one case extending, for the protection of the health, morals and safety of its people, to the absolute prohibition of the sale or use of the article, and in the other extending only to such regulations as may be necessary for the safety of the community, until it has been incorporated into and become a part of the general property of the state. However much this distinction may be open to criticism, it furnishes, as it seems to me, the only way in which the two decisions can be reconciled.

"There is great difficulty in drawing the line precisely where the commercial power of Congress ends and the power of the state begins. The same difficulty was experienced in *Brown* v. *Maryland*, in drawing a line between the restriction on the states to lay a duty on imports, and their acknowledged power to tax persons and property. In that case the court said that the two, the power and the restriction, though distinguishable when they did not approach each other, might, like the intervening colors between white and black, approach so nearly as to perplex the understanding as colors perplex the vision, in marking the distinction between them; but as the distinction existed, it must be marked as the cases arise. And after observing that it might be premature to state any rule as being universal in its application, the court held as sufficient for that case that when the importer had so acted upon the thing imported, that it had

become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and had become subject to the taxing power of the state; but that while remaining the property of the importer, in his warehouse in the original form or package in which it was imported, a tax upon it was plainly a duty on imports.

"So in the present case it is, perhaps, impossible to state any rule which would determine in all cases where the right to sell an imported article under the commercial power of the federal government ends and the power of the state to restrict further sale has commenced. Perhaps no safer rule can be adopted than the one laid down in *Brown* v. *Maryland*, that the commercial power continues until the articles imported have become mingled with and incorporated into the general property of the state, and not afterwards. And yet it is evident that the value of the importation will be materially affected, if the article imported ceases to be under the protection of the commercial power upon its sale by the importer. There will be little inducement for one to purchase from the importer, if, immediately afterwards, he can himself be restrained from selling the article imported; and yet the power of the state must attach when the imported article has become mingled with the general property within its limits, or its entire independence in the regulation of its internal affairs must be abandoned. The difficulty and embarrassment which may follow must be met as each case arises."

It is very properly said by Mr. Justice Field, in the concurrent opinion just quoted, that "What is an article of commerce is determinable by the usages of the commercial world and does not depend upon the declaration of any state."

So in this case, the slaughter of animals for the purpose of preserving the meats in ice-houses and transporting them throughout the civilized world in refrigerator cars, to be sold for use as food, is a usage of the commercial world which determines that such meats are articles of commerce. It is properly said that such property may cease to be an article of commerce when it becomes unfit for sale or use. In every such instance there is no protection by the commercial clause of the constitution. Applying the same rule, it may properly be said that intoxicating liquors are not articles of commerce when the sale and use are prohibited in any state. The validity of such laws depends upon the theory that the sale of liquors is a public nuisance, and in the interest of society may be abated. No such position can be assumed in regard to dressed meats. A clear line of distinction may be drawn between the two articles of merchandise. It may be said with great reason that intoxicating liquors are not articles of commerce when the use is prohibited by law; they are an exception to all other articles of merchandise.

If the state, however, can prohibit the sale of wholesome meats upon any alleged ground, a like prohibition may be made against flour, or other articles of food. Canned meats, canned goods, oysters, and the like, could be excluded from any state. It is not necessary for the protection of the health of any community, that healthful and wholesome articles of this kind should be excluded from the state, or the sale prohibited. Proper inspection laws can be made in any state, or in any city, which would accomplish every desirable result without interfering with the general trade and traffic of the country.

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Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

In the Matter of the Application of Henry E. Barber for a Writ of Habeas Corpus.

THE STATE OF MINNESOTA,

Appellant,

vs.

HENRY E. BARBER,

Respondent.

Points and Authorities of Walter H. Sanborn, for Respondent.

JOHN B. & W. H. SANBORN,
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H. M. SMYTH PRINTING COMPANY, ST. PAUL.

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THE STATE OF MINNESOTA,
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vs.

HENRY E. BARBER,
Respondent.

BRIEF AND ARGUMENT OF WALTER H. SANBORN, FOR RESPONDENT.

STATEMENT OF THE CASE.

At the session of 1889 the legislature of the State of Minnesota passed an act entitled "An act for the protection of the public health by providing for inspection before slaughter of cattle, sheep and swine designed for slaughter for human food," approved

April 16, 1889, which now constitutes chapter eight of the Minnesota Session Laws of 1889, and reads as follows:

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The sale of any fresh beef, veal, mutton, lamb or pork for human food in this State, except as hereinafter provided, is hereby prohibited.

Sec. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs and townships within this State to appoint one or more inspectors of cattle, sheep and swine for said city, village, borough or township, who shall hold their offices for one year and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially coextensive with the board so appointing them, and said several boards shall regulate the form of certificate to be issued by such inspectors and the fees to be paid them by the person applying for such inspection, which fees shall be no geater than are actually necessary to defray the costs of the inspection provided for in section three of this act.

Sec. 3. It shall be the duty of the inspectors appointed hereunder to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions, within twenty-four hours before the slaughter of the same, and if found healthy and in suitable condition to be slaughtered for human food, to give the applicant a certificate in writing to that effect. If found unfit for food by reason of infectious disease, such inspectors shall order the immediate removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

Sec. 4. Any person who shall sell, expose or offer for sale for human food in this State any fresh beef, veal, mutton, lamb or pork whatsoever which has not been taken from an animal inspected and certified before slaughter by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars, or by imprisonment not exceeding three months for each offense.

Sec. 5. Each and every certificate made by inspectors under the provisions of this act shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were at the date of such inspection free from all indication of disease, apparently in good health and in fit condition when inspected to be slaughtered for human food, a duplicate of which certificate shall be preserved in the office of the inspector.

Sec. 6. Any inspector making a false certificate shall be liable to a fine of not less than ten dollars nor more than fifty dollars for each animal falsely certified to be fit for human food under the provisions of this act.

Sec. 7. This act shall take effect and be in force from and after its passage.

Henry E. Barber was arrested, tried and committed to jail for selling for human food one hundred pounds of sound and wholesome fresh dressed beef which belonged to Armour & Co., a firm whose members resided in Illinois, and which had been taken from an animal slaughtered in Illinois, (where they had long been engaged in the business of slaughtering animals

and shipping their products throughout the United States for sale,) and shipped to Minnesota to sell, on the ground that this animal had not been inspected within twenty-four hours before slaughter in Minnesota by local inspectors of that State.

Mr. Barber sued out a writ of habeas corpus in the United States Circuit Court for the District of Minnesota, and after hearing before Judge Nelson he was discharged on the ground that the above statute was void because it violates article one, section eight of the constitution of the United States, which provides that "the congress shall have power to regulate commerce among the several States;" and also because it violates article four, section two of the same constitution, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States."

In re Barber, 39 N. W. Rep. 641.

Judge Blodgett, of the Circuit Court of the Northern District of Illinois, came to the same conclusion regarding this law.

Swift vs. Sutphin, 39 N. W. Rep. 630.

A similar law has been held void in Indiana.

Harvey vs. Huffman, 39 N. W. Rep. 646.

Two of the ablest and most learned Judges of the District Court of the State of Minnesota have held this law void in a case exactly similar to the one at bar.

In re Christian, 39 N. W. Rep. 636.

From this order discharging Mr. Barber the State appeals, and the only question here is whether chapter eight, laws of 1889, is or is not constitutional.

It is claimed by General Cole for the State that this

act is constitutional, and his argument is in short this: He claims—

1st. The police power which the States originally had at the formation of the Union they still retain, and as the safety of the people is the highest law, this power, whenever the safety of the people requires its exercise, is superior to all other powers and especially to the power granted by the States to the congress to regulate commerce between the States.

Gen. Cole's Brief, page 6, 4th paragraph.
Gen. Cole's Brief, page 22, 2d paragraph.
Gen. Cole's Brief, page 37, 1st paragraph.

2d. The legislatures of the several States are the primary judges of the extent to which this power shall be exercised, and of the articles which in the exercise of this power should be excluded from their respective States, and when any legislature has acted its action is ordinarily conclusive of both the necessity and the validity of its action.

Gen. Cole's Brief, page 8, paragraph 2d.

3d. The act in question shows that the legislature of Minnesota has exercised, and consequently that it deemed it necessary to exercise this police power far enough to exclude from this State all fresh dressed meat taken from any animals not slaughtered within the State.

Therefore it is no infringement of the constitution of the United States to pass and enforce this act, for the courts must presume that it was necessary to pass it, however clearly they may see that it was not. (Pages 44:45 Brief.)

We think the above is a fair statement of the propositions and reasoning by which this law is sought to be sustained. Nor will any proposition less broad and sweeping sustain this legislation, for there is no article of commerce more healthful, more wholesome, more beneficial to society or less liable to impurities and unsoundness than fresh dressed beef, and no court will ever hold that in its opinion it is necessary to exclude all sound fresh meats from a State to prevent the introduction of the possibly unsound.

The only proposition that will ever exclude these sound fresh meats, is that which proclaims the legislature the sole judge of the wisdom of this exclusion and deprives the courts of the right to examine the question.

We have stated briefly the argument of our learned opponent, and it seems to us its statement is its refutation.

It proves too much. It proves that congress has no power to regulate interstate commerce; for if the police power is supreme and is held by the States, and if the legislatures of the respective States are the judges of the necessity and limits of the exercise of this power, and of the articles of commerce that in its exercise it is necessary to exclude from their respective States, it is clear that these legislatures may exclude any or all articles not the product of the soil and manufactures of their own States respectively, and that there will be as many different lines marking the exercise of this power as there are States.

If this be the law, then the power given to the congress to regulate interstate commerce is a nullity.

In Bowman vs. Chic. &c. Ry. Co., 125 U. S. 465, the State of Iowa had adopted and passed a general system of laws which prohibited the manufacture, sale, gift and use of all intoxicating liquors, except for medical, scientific or manufacturing purposes, within that State. Citizens had claimed that the law was void in that it deprived them of their rights of liberty and property as citizens of the United States under the fourteenth amendment to the constitution, and the Supreme Court of the United States had held that as to the citizens of the State enacting it it was valid, because the use of these liquors caused pauperism and crime, and the court said that if the State legislature on this account prohibited their use and sale the citizens of that State must abide by the decision of the legislature on this doubtful question. (Mugler vs. Kansas, 123 U. S. 662.)

As a part of this same legislation the State law provided that no liquor should be imported into the State unless the importer first obtained a certificate that it was to be imported to some licensed druggist, and that if he did so import without such certificate, he should be fined or imprisoned; and this portion of the law came up for consideration in this Bowman case after the Supreme Court had held that the prohibition of the sale and use, by citizens of the State, of their own liquor, was valid.

The case stood as this case would stand if the manufacture, sale and use of all fresh dressed meats by all citizens of Minnesota had been lawfully prohibited.

Under these circumstances the same argument here presented by Gen. Cole was urged upon the Supreme Court in support of that portion of the law restraining

importation, and Mr. Justice Matthews, at page 490, quoting and affirming the words of Mr. Justice Catron in the License Cases, 5 How., 504, 599, thus disposed of it. He said:

"The exclusive State power is made to rest not on the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the State laws, and asserted as the State policy, that it shall be excluded from commerce, and by this means the sovereign jurisdiction of the State is attempted to be created in a case where it did not previously exist.

"If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation, for it takes from congress and leaves within the States the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory the power to regulate commerce instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation is, in effect, the controlling one. The police power would not only be a formidable rival, but in a struggle must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.

"The same process of regulation and reasoning by the State and its courts could bring within the police power any article of consumption that a State might

wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety—as malt liquors and the produce of fruit other than grapes stand on no higher ground than the light wines of this and other countries excluded in effect by this law as it now stands; and it would only be another step to regulate real or supposed extravagance in food or clothing."

Again at page 494 he said:

"If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco or any other article, the use or abuse of which it may deem deleterious, it may not choose even to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or articles of any description, and prevent the introduction and sale within its limits of any or all articles that it may select as coming into competition with those which it seeks to protect." * * *.

And at page 493 he said:

"*The State cannot without the consent of congress, express or implied, regulate commerce between its people and those of other States of the Union in order to effect its end, however desirable such a regulation might be.*"

In further refutation of the positions taken by appellant's counsel, and in support of the decision below, we present the following:

POINTS AND AUTHORITIES.

I.

The power to regulate commerce between the States was carved out of the general sovereign power held by each State and granted by the constitution to the congress of the United States. This power was thus vested in the congress *exclusively*, and no State by virtue of any power not thus granted, whether under the name of police power or under any other name, can lawfully infringe upon this grant. This power to regulate commerce thus granted to congress is not subordinate to any of the powers not granted, but it is paramount to all the powers of the States, and any act of a State which interferes with interstate commerce in a well known and sound article of commerce is unconstitutional and void.

Railroad Co. vs. Husen, 95 U. S. 465, 471–3.
Bowman vs. C. & N. W. Ry. Co., 125 U. S. 474, 475, 479, 480–1, 484–5, 488–9, 497, 507–8.
Henderson vs. Mayor of New York, 92 U. S. 271–2.
Foster vs. Blue Earth County, 7 Minn. 140.
Mugler vs. Kansas, 123 U. S. 623–4.
Gibbons vs. Ogden, 9 Wheat. 1.
Brown vs. Maryland, 12 Wheaton, 419, 439, 448.
Welton vs. Missouri, 1 Otto, 275, 280.
Passenger Cases, 7 Howard, 283, 426–7, 463–4.
Chy Lung vs. Freeman, 2 Otto, 275.
State Freight Tax Case, 15 Wall. 232, 279–80.
Crandall vs. Nevada, 6 Wall, 35, 44, 48, 49.
County of Mobile vs. Kimball, 102 U. S. 691.

Hall vs. DeCuir, 95 U. S. 485, 488–90, 497–8, 513.
Wabash &c. Ry. Co. vs. Illinois, 118 U. S. 557, 569, 577.
Stockton vs. Baltimore &c. R. R. Co., 32 Fed. Rep. 9.
W. U. Tel. Co. vs. Pendleton 95 Ind. 12.
Graffty vs. Rushville, 107 Ind. 502.
Swift vs. Sutphin, 39 N. W. Rep. 630.
In re Barber, 39 N. W. Rep. 641.
In re Christian, 39 N. W. Rep. 636.

In Foster vs. Blue Earth County, 7 Minn. 140 (Gil. 84), at page 145, the Supreme Court of Minnesota, said:

"It is not necessary to expend argument at the present day to prove that this power for the regulation of commerce granted by the States is vested solely and exclusively in congress. The question has been most thoroughly examined by the Supreme Court of the United States in reference to that portion of the grant which refers to the Indian tribes, and it has been held by the court that the term 'commerce' comprehends intercourse of every character with the tribes."

The case of Railroad Co. vs. Husen, 95 U. S. 465, is we claim exactly in point here; the law in question in that case prohibited interstate commerce in *live cattle*, but permitted it in the *product of the slaughtered animals*.

The law now in question prohibits interstate commerce in the product of the slaughtered animal, but permits it in the live animal. It was argued there, as

here, that the law was necessary to protect against the "Texas fever;" that the State was the proper judge of the necessity of the law, and that it was a proper exercise of the police power; but the court held it void, and said, at page 471:

"But whatever may be the nature and reach of the police power of the State, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government." * * *

And at page 472 the court said:

"While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health or property within its borders, while it may prevent persons and animals suffering under contagious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.

"*It may not, under the cover of the exercise of its police powers, substantially prohibit or burden either foreign or interstate commerce.*"

Of course it must be admitted that the power of the State over well recognized articles of commerce is subject to the same limitations as its power over immigrants, for the same clause of the constitution in the same words gives the congress the power over each. But in the Passenger Cases, 7th Howard, at page 426, answering the same argument now urged by Gen. Cole in support of this law, Mr. Justice Wayne said:

"The States have also reserved the police right to turn off from their territories paupers, vagabonds and fugitives from justice; but they have not reserved the right of taxation universally as the means to accomplish this object, as they had it before they became the United States. *Having surrendered to the United States the sovereign police power over commerce, to be exercised by congress or the treaty making power, it is necessarily a part of the power of the United States to determine who shall come to and reside in the United States for the purposes of trade*, independently of every other condition of admittance which the States may attempt to impose upon such persons."

And in answer to the claim there urged, that to protect against paupers and vagabonds the State might impose restrictions on *all immigrants*, as it is here urged that to protect against diseased meat the State may prohibit the introduction of *all meat*, the same learned justice, at page 427, said:

"But can such a police power be rightfully exercised over those who are not paupers, vagabonds or fugitives from justice? The international right of visitation forbids it; the freedom or liberty of commerce allowed by all European nations to the inhabitants of other nations does not permit it; and the constitutional obligations of the States of the Union to the United States, in respect to commerce and navigation and naturalization, have qualified the original discretion of the States as to who shall come and live in the United States."

In answer to the argument that the States have unlimited discretion to exclude whom they see fit under their unsurrendered police power, the same justice said:

"That erroneous proposition of the State's discretion in this matter has led to all the more mistaken inferences made from it. The error arose from its having been overlooked that a part of the supreme police power of a nation is identical, as I have shown it to be, with its sovereignty over commerce."

And the conclusion is announced that "the laws of Massachusetts and New York derive no support from police power in favor of their constitutionality."

Answering the same argument, Mr. Justice Grier said, at page 463:

"The argument of those who challenge the right to exercise this power for the States of Massachusetts and New York on the ground that it is a necessary appurtenant to the police power, seems fallacious also in this respect. It assumes that, because a State in the exercise of her acknowledged right may exclude paupers, lunatics, etc., therefore she may exclnde *all* persons, whether they come within this category or not. But she may exclude putrid and pestilential goods from being landed on her shores. *Yet it does not follow that she may prescribe what sound goods may be landed, or prohibit their importation altogether.* The powers used for self defense and protection against harm cannot be perverted into weapons of offense and aggression upon the rights of others."

The same argument was again presented to the Supreme Court of the United States in Henderson vs. The Mayor, etc., 95 U. S., page 264. In this case a law had been passed by the State of New York in order to protect its people against paupers and criminals, requiring a bond on behalf of each immigrant

that he should be self supporting for ten years. The learned counsel for the State said (92 U. S. page 264):

"The right of the State to exact this indemnity cannot depend upon the manner in which it is exercised after the immigrant has been landed. There is no practical mode in which the State can correctly decide which of these alien strangers is self supporting. *Hence it may rightfully exact indemnity from all.*"

But the court answered this argument and said, at page 27:

"Whatever may be the nature and extent of that power (the police power) where not otherwise restricted, no definition of it, and no urgency for its use can authorize a State to exercise it in regard to a subject matter which has been confided exclusively to the discretion of congress by the constitution. Nothing is gained in the argument by calling it the police power."

In Stockton vs. Baltimore, etc., R. R. Co., 32 Fed. Rep. 9, the court said, at page 17, speaking of the power to regulate commerce vested in congress:

"We think that the power of congress is supreme over the whole subject, unimpeded and unembarrassed by State lines or State laws. In this matter the country is one and the work to be accomplished is national; and State interests, State jealousies and State prejudices do not require to be consulted. *In matters of foreign and interstate commerce there are no States.*"

Hall vs. DeCuir, 95 U. S. 485, is an instructive case: A State law had been passed which required

those transporting passengers between the States to give all persons traveling within the State upon vessels employed in this business equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected the owners of a vessel who excluded colored passengers, on account of their color, from the cabin set apart for the use of whites, to damages. The Supreme Court held this to be a regulation of commerce and void, and said, at page 490:

"*If the public good requires such legislation it must come from congress and not from the States.*"

II.

Fresh dressed beef is perhaps the most uniformly sound and wholesome, and the most universally recognized article of trade and commerce in the United States.

Now, while there are certain subjects in their nature local, such as harbor-pilotage, buoys, beacons, bridges, etc., regarding which a State may legislate when congress has not, yet when the subject matter is the free transportation or sale of a well recognized article of commerce such as fresh dressed beef, the product of another State, the subject is in its nature national, susceptible of regulation by rules uniform throughout the nation, and obviously susceptible of wise regulation by such uniform national rules only, and *in such a case* there can of necessity *be only one system* or plan of regulation, and that *congress alone can prescribe.*

Any law of a State which in any way prohibits or interferes with the free commerce in such a well recog-

nized article of commerce is void because it attempts to exercise a power which the State has granted exclusively to the congress.

Mobile vs. Kimball, 102 U. S. 691.
Brown vs. Houston, 114 U. S. 630.
The Wabash Ry. vs. Illinois, 118 U. S. 566–577.
Bowman vs. C. & N.W. Ry. Co., 125 U. S. 480–499.

In Mobile vs. Kimball, 102 U. S. 691:697, the United States Supreme Court said:

"The subjects, indeed, upon which congress can act under this power (to regulate commerce) are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation affecting alike all the States; others are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities; of the former class may be mentioned all that portion of commerce with foreign countries or between the States, which consists in the transportation, purchase, sale and exchange of commodities. *Here there can of necessity be only one system or plan of regulations, and that congress alone can prescribe.*"

In Brown vs. Houston, 114 U. S. at page 630, Mr. Justice Bradley, delivering the unanimous opinion of the court on this subject, said:

"The power of congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation, and is certainly so far exclusive that no State has power to make any

law or regulation which will affect the free and unrestrained intercourse and trade between the States, as congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction. * * * * * So long as congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammeled, and any regulation of the subject by the States is repugnant to such freedom."

In Bowman vs. Railway Co., 125 U. S. at page 501, Mr. Justice Field said:

"What is an article of commerce is determined by the usages of the commercial world, and does not depend upon the declarations of any State. * * * If a State could thus take an article from commerce, its power over interstate commerce would be superior to that of congress, where the constitution has vested it."

And Mr. Justice Matthews said, at page 490:

"If from its nature it does not belong to commerce, or if its condition from putrescence or other cause is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State may exclude its introduction, and as an incident to this power it may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the police power of the State, *and that which does belong to commerce is within the jurisdiction of the United States.*"

In the License Cases, 5 Howard, 504:599, Mr. Justice Catron said:

"The assumption is that the police power was not touched by the contitution, but left to the States as the constitution found it. This is admitted; and whenever a thing from character or condition is of a description to be regulated by that power in the State, then the regulation may be made by the State, and congress cannot interfere. But this must always depend upon the facts subject to legal ascertainment that the injured may have redress. *And the fact must find its support in this whether the prohibited article belongs to and is subject to be regulated as part of foreign commerce, or of commerce among the States.*"

It therefore conclusively follows that if fresh dressed beef is an article of commerce this State law is void because no power but congress could lawfully interfere with the interstate commerce in it.

III.

In all cases where the congress has passed no law regulating interstate commerce in any well recognized article of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of a State which prohibits or restrains it is unconstitutional and void.

Brown vs. Houston, 114 U. S. 622, 631.

Bowman vs. C. & N. W. Ry. Co., 125 U. S. 485:507.

Walling vs. Michigan, 116 U. S. 455–6.

Welton vs. Missouri, 91 U. S. 275, 282.

State Freight Tax, 15 Wall. 232.

In Welton vs. Missouri, 91 U. S. 282, the court says:

"The fact that congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the subject. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri."

Mr. Justice Field in the Bowman Case, 125 U. S., at page 508, says:

"Thus the absence of regulation as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted."

IV.

Any prohibition or restriction of the *sale* of a manufactured product of another State is an unlawful restriction of commerce in the article, and is as much a violation of the constitution as is the prohibition of its importation.

Brown vs. Maryland, 12 Wheaton, 419-447.
Welton vs. Missouri, 91 U. S. 275:282.
Robbins vs. Shelby Tax District, 120 U. S. 497.
Bowman vs. C. & N. W. Ry. Co., 125 U. S. 465-504.

We notice that in Butler vs. Chambers, 36 Minn. 72, the Minnesota Supreme Court said:

"In the License Cases, 5 How. 504:577, it is said 'a State is not bound to furnish a market for imported goods, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens.'"

This was a mere quotation, was *obiter dictum*, and the decision was placed upon an entirely different ground. (See foot of page 72.)

This quotation however is relied on by our learned opponent and by the Supreme Court of Iowa, in Leisey vs. Hardin, as being the law of the land.

We think that we can show that it is not, and that the proposition at the head of this point is.

Of course the Supreme Court of the United States alone can finally decide this question, and if it *has* decided it that ends the matter.

In Brown vs. Maryland, 12 Wheaton, 417, 439, 447, a law of Maryland which required the importer of an article to pay a license of fifty dollars for the privilege of selling it, was held void because it violated the commercial clause of the constitution. The question was made and necessarily decided.

Chief Justice Marshall delivered the opinion of the court. He said, at page 439:

"There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be the necessary consequence of the other. No goods would be imported if none could be sold."

And at page 447 he said:

"It is inconceivable that the power to authorize this

traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. *It is as essential an ingredient, as indispensable to the existence of the entire thing as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell.*"

Thus in 1827 this question was decided by the United States Supreme Court. That decision has never been reversed or modified.

In 1875, in the case of Welton vs. The State of Missouri, the same question again arose and was again decided. In that case the State undertook to impose a license tax for *selling* the products of other States. The decision of the court was unanimous. It expressly reaffirmed Brown vs. Maryland. The syllabus, speaking of the power to regulate commerce vested in congress, says (91 U. S. 275):

"It covers property which is transported as an article of commerce from foreign countries or among the States, from hostile or interfering State legislation until it has mingled with and become a part of the general property of the country, *and protects it even after it has entered a State, from any burdens imposed by reason of its foreign origin.*"

Mr. Justice Field, who delivered the unanimous opinion of all the judges, said at page 282:

"It is sufficient to hold now that the commercial power *continues until the commodity has ceased to be the subject of discriminating legislation by reason of its origin. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.* The act of Missouri encroaches upon this power in this respect, and is therefore in our judgment unconstitutional and void."

In the License Cases no decision of the court was rendered. The judges could agree on no principles, and so they affirmed the judgments below and each wrote an opinion.

Chief Justice Taney, who had argued Brown vs. Maryland for the State, and been defeated and convinced against his will, said at page 577:

"But although a State is bound to receive and *permit the sale* by the importer of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens."

Now what he meant by saying the State was not bound to furnish a market we don't know, but we know that he clearly said the State must *permit the sale*, and that even under these remarks this law which prohibits the sale is void.

Mr. Justice McLean at page 587 said:

"And first it is insisted these laws are unconstitutional, as they prohibit the importer from selling an article he is authorized to import without the payment

of an additional duty or impost which the State cannot impose. The case of Brown vs. Maryland, 12 Wheat. 419, is supposed to be conclusive upon this point. THIS MAY BE ADMITTED, AND YET IT DOES NOT RULE the case before us."

And then he goes on to show that this was not a sale by an importer. There is nothing in these or any of the opinions in the License Cases which reverses or even disapproves the decision in Brown vs. Maryland on this point.

Thus stood this decision in Brown vs. Maryland until 1887, when a statute of Tennessee which required all persons selling or soliciting the sale of any goods in a certain tax district of that State to pay a tax of $10 a week or $25 a day for such privileges. One Robbins was selling in that district the goods of Rose, Robbins & Co., a Cincinnati, Ohio, firm, and was arrested for so doing without a license, and the case was presented to the United States Supreme Court, which promptly held, in Robbins vs. Shelby Taxing District, 120 U. S. 489 495, 497, that interstate commerce included the sale as much as the importation of goods from without the State; that any tax on or interference with the sale by the State was a violation of the constitution; that the Tennessee law was void, and discharged the prisoner.

In Bowman vs. Chic. &c. Ry. Co , 125 U. S. 465, the question was not whether a sale of the liquor might be prohibited, but whether its importation could be restricted.

Nevertheless Mr. Justice Matthews, who delivered the opinion of the court—five judges—said on this subject at page 499:

"It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes by necessary implication the right of the importer to sell in unbroken packages at the place where transit terminates, for the very purpose and motive of that branch of commerce consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in Brown vs. Maryland, 12 Wheaton, 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States."

And Mr. Justice Field, in his concurring opinion at page 504, says:

"That the right of importation carries with it the right to sell the article imported does not appear to me doubtful. Of course I am speaking of an article that is in a healthy condition, for when it has become putrescent or diseased it has ceased to be an article of commerce, and it may be destroyed or its use prohibited. To assert that under the constitution of the United States the importation of an article of commerce cannot be prohibited by the States, and yet to hold that when imported its use and sale can be prohibited, is to declare that the right which the constitution gives is a barren one, to be used only so far as the burden of transportation is concerned, and to be denied so far as any benefits from such transportation are sought. The framers of the constitution never intended that a right given should not be fully enjoyed."

In the same case Mr. Justice Harlan filed a dissenting opinion, and with him the chief justice and Mr. Justice Gray concurred, in which no claim is made

that the decisions we have cited were or ought to be reversed. Their only claim was that because intoxicating liquors were injurious to the race the State ought to have the power to prohibit both importation and sale.

That opinion admitted that as to articles of commerce not in themselves dangerous to the health, morals or safety of the people, like dry goods in the Brown case and dressed beef here, sale was a part of interstate commerce and could not be interfered with (pages 518-19).

But even this was a dissenting opinion in any event. It is what the law *is not*. The opinions of Justices Matthews and Field and the opinions of five of the eight judges were that the sale of liquor even is as necessary an ingredient of interstate commerce as is importation.

However, the Supreme Court held unanimously in 1827, 1875 and 1887, in the three cases in which it was necessary to decide the question, that the sale was as necessary an ingredient of interstate commerce as the importation.

We therefore submit that the decision in Brown vs. Maryland is the law of the land, and inasmuch as the sale by the importer is as essential an ingredient of interstate commerce as is the importation itself, a prohibition of the *sale* of the imported article is as much a prohibition of interstate commerce as is the prohibition of importation.

See 39 N.W. Rep. 645, 635.

V.

The statute in question prohibits the sale for human food of fresh dressed beef not manufactured from an animal inspected by a local Minnesota inspector within twenty-four hours before its slaughter; practically it prohibits the sale of this well known article of commerce unless it is manufactured from the animal in Minnesota, and thus it prohibits interstate commerce in this article, for to prohibit its sale is to take away the only motive for importation, and thus to practically prohibit importation.

The law violates section eight article four of the constitution because it prohibits commerce in this well known and wholesome article of commerce between the States.

Swift vs. Sutphin, 39 N. W. Rep. 630.
In re Barber, 39 N. W. Rep. 641.
In re Christian, 39 N. W. 636.
Harvey vs. Huffman, 39 N. W. Rep. 646.
Railroad Co. vs. Husen, 95 U. S. 265,
And cases cited under point 1, supra.

VI.

This law violates the provisions of section two article four of the constitution of the United States, which provides "that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States."

This povision of the constitution gives to the citizens of other States the right to introduce and sell the product of those States in Minnesota *on the same terms* that her own citizens sell their products.

The Illinois dressed beef—the Kansas dressed beef seeking sale here may have been, in fact has been carefully inspected in those States both before and after the slaughter, and is sound and wholesome; but this law prohibits the sale of *all* such beef manufactured in other States, no matter how carefully it has been inspected, no matter how sound and wholesome it may be, while it permits the sale of a like product manufactured in Minnesota.

Ward vs. Maryland, 12 Wallace, 418.
Walling vs. Michigan, 116 U. S. 446, 459.
Tiernan vs. Rinker, 102 U. S. 123.
Robbins vs. Shelby Co. Tax District, 120 U. S. 489.
Bowman vs. C. & N.W. Ry.Co., 125 U. S. 495–6.
Welton vs. State, 91 U. S. 275.
Asher vs. Texas, 128 U. S. 129.
In re Watson, 15 Fed. Rep. 511.
Millett vs. The People, 117 Ill. 294.
Cooley's Const. Lim., page 391.
Brown vs. Houston, 114 U. S. 630.
Swift vs. Sutphin, 39 N. W. Rep. 635.
In re Barber, 39 Fed. Rep. 646.
Harvey vs. Huffman, 39 N. W. Rep. 650.
In re Christian, 39 N. W. Rep. 636.

In Ward vs. Maryland, 12 Wall. 418, the statute required persons bringing certain articles into the State to obtain a license that was not required of residents of the State. The court held the act void because it thus imposed burdensome restrictions on citizens of other States not placed upon the citizens of that State.

In Walling vs. Michigan, 116 U. S. 446, at pages 459–60, the court said:

"It is suggested by the learned judge who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not discriminate against the *citizens* and PRODUCTS of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature. *The police power cannot be set up to control the inhibitions of the federal constitution or the powers of the United States government created thereby.*"

Tiernan vs. Rinker, 102 U. S. 123, holds a similar State law void on the same ground.

In Brown vs. Houston, 114 U. S. 630, the Supreme Court declared that the power over commerce granted to the congress "is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse between the States as congress has left it, *or which will impose any discriminating burden* or tax upon the *citizens* or PRODUCTS of other States coming or brought within its jurisdiction."

VII.

This law is not valid as an inspection law for three reasons:

1st. Because it prohibits interstate commerce in a universally recognized article of commerce and thus violates the commercial clause of the constitution as we have shown.

Clause 2, section 8, article 1, which grants to congress the power to regulate commerce, is not subject to the right of a State to pass inspection laws. The States are prohibited by clause 2, section 10, article 1, from laying imposts or duties on imports or exports "except what may be absolutely necessary for executing its inspection laws."

There is no such qualification to the commercial clause; that is absolute and without limitation. The State is permitted to levy an impost or duty, but only so far as may be absolutely necessary to aid proper inspection laws. But this authority is confined to imposts or duties, and does not relate to regulations of commerce.

Hence this law, if it was in form a proper inspection law, is void because it prohibits interstate commerce in a well known article of commerce, when the exclusive power on that subject has been granted to congress without any reservation whatever.

2d. Because the law upon its face shows that it was neither necessary to, nor intended to, promote the health or comfort of the consumers of fresh meat; but that its sole object was to protect the owners of a few slaughter houses in Minnesota from a healthy competition with citizens of other States.

The court will take judicial notice that no terrible pestilence, directly or indirectly traceable to the eating of fresh beef, hung over Minnesota last winter and terrified its legislature to pass this law to stop its devastating progress. We have all heard of disease and death from the want of fresh dressed beef, but who ever heard of either, from eating fresh beef.

The court will take judicial notice that the canned and cured meats are at least one hundred times as liable to cause sickness or injury as are the fresh dressed meats, and are one hundred times more difficult of useful inspection than fresh meats, but this law requires no inspection of these before or after slaughter. The same fresh meat whose sale is prohibited, forsooth because the steer from which it was taken might have had a lump on his jaw, or a tubercle on his lung, or a fly spot on his nose, may be sprinkled with a little salt, begrimed with a little smoke or covered with a piece of tin, and lumps and tubercles hurt it no more. The law permits its sale then without any inspection. It permits the commerce in the entrails, the tripe, the sausage, the lard, the tallow, in every product of the animal whether cured or fresh, except that part which is the most wholesome and nutritious and the least liable to become injurious, and *that* it prohibits.

Further, as is well said by Gen. Cole at page 20 of his brief, "any man may freely import this dressed beef for his own consumption." The law does not prohibit the innkeepers of Minnesota from buying this beef and feeding their thousands of customers with it, (and it is common knowledge that they do buy it daily because this is the best, tenderest and most

nutritious meat). It does not prohibit the individual citizen from buying and using it. In fine, the law in no way prohibits the use or consumption of this meat, but is limited solely to prohibiting interstate commerce in it.

Is it not clear then that this law was enacted not to protect the health or comfort of the citizen or the community, but for the sole purpose of protecting a few wealthy citizens from competition with citizens of other States in their meat business?

3d. Because it makes no distinction in its prohibition between pure and healthful food and diseased and injurious food. It makes the test of the commercial quality of the article, not its healthfulness or its soundness, not its quality or character, thus seeking to separate as it might the evil from the good, but it makes the test *the place of its manufacture.*

A piece of fresh beef, sound, wholesome, duly inspected in Illinois in the animal within 24 hours of slaughter, cannot be sold, while one inspected in Minnesota may be, whether it be sound or rotten.

The only test is where was the beef manufactured from the animal?

The Passenger Cases, 7 Howard, 426-7, 463.
Railroad Co. vs. Husen, 95 U. S. 265.
Kimmish vs. Ball, 129 U. S. 277.

In Railroad Co. vs. Husen, 95 U. S. 469, Mr. Justice Strong, speaking of the Missouri law which prohibited the introduction of live cattle, said at page 469:

"Whatever may be the power of a State over commerce that is completely internal, it can no more pro-

hibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States to congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive."

After citing other cases on the subject the opinion proceeds, at page 473:

"Tried by this rule the statute of Missouri is a plain intrusion upon the exclusive domain of congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies: 'You shall not bring into the State any Texas cattle, or Mexican cattle, or Indian cattle between March 1st and December 1st in any year, *no matter whether they are free from disease or not; no matter whether they may do an injury to the inhabitants or not;* and if you do bring them, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of the State to enact. To hold otherwise would be to ignore one of the leading objects which the constitution of the United States was designed to secure."

In Kimmish vs. Ball, 129 U. S. 217, a statute of Iowa was sustained which protected the citizens and cattle of Iowa from *diseased* Texas cattle after they came into the State. It related only to diseased Texas cattle, and imposed no penalty on the owners of sound cattle, while the Missouri law and the Minnesota law we are considering make the diseased and the sound suffer alike.

Mr. Justice Field, in his opinion in 129 U. S., at page 221, makes clear this distinction. He says:

"Nor does the case of Railroad Co. vs. Husen, 95 U. S. 465, upon which the defendant relies with apparent confidence, have any bearing upon the questions presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle, and this circumstance is prominently put forth in the opinion. 'It is noticeable,' said the court, 'that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not.' (Page 469) * * *

"Such a statute the court held was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce and therefore invalid. At the same time the court admitted unhesitatingly that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. (Page 472.) *No attempt was made to show that all Texas, Mexican or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased.* Had such proof been given a different question would have been presented for the consideration of the court."

If the Minnesota legislature had provided that all dressed beef should be inspected at the border of the

State and the sound should be admitted and the unsound turned back, or had it provided any fair method of admitting the sound and rejecting the unsound, the law would have had the semblance of an inspection or quarantine law, but it prohibits interstate commerce in *all* fresh meats, whether sound or not. As in the Husen case, there is no evidence in this case that all fresh meats dressed without the State were diseased, or that such fresh meats were so generally diseased that the sound could not be separated from the unsound. On the other hand, we all know they are the most wholesome, tender and healthy meats in the world. Such a law is void.

VIII.

The legislature is not the judge of the necessity or limits of the exercise of its police power or the validity of its acts.

It is the province and duty of the courts to look at the law itself, its ulterior purpose and effect, and if it in fact imposes restrictions upon interstate commerce, or restricts the equal privileges and immunities of citizens of other States, to declare it void, no matter what its form or under what pretense it was enacted.

Powell vs. Pennsylvania, 127 U. S. 686.
Mugler vs. Kansas, 123 U. S. 623:661.
Mayor vs. Louisiana, 118 U. S. 455:462.
Bowman vs. C. & N. W. Ry. Co. 125 U. S. 465.
Henderson vs. Mayor of N. Y., 92 U. S. 268.
Chy Lung vs. Freeman, 92 U. S. 275.
State vs. Fisher, 52 Mo. 177.
In re Jacobs, 98 N. Y. 98.

Walling vs. Michigan, 116 U. S. 446.
Yeck Wo vs. Hopkins, 118 U. S. 356.
Case of The State Freight Tax, 15 Wall. 232.
Watertown vs. Mayo, 109 Mass. 315.
Austin vs. Murray, 16 Pick. 126.
Ames vs. County, etc., 11 Mich. 139.

Mr. Justice Harlan, in Mugler vs. Kansas, 123 U. S. 623, announced the doctrine which all the above authorities adopt. He said:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police power of the State. There are of necessity limits beyond which legislation cannot rightfully go. * * * The courts are not bound by mere form, nor are they to be misled by mere pretenses. They are at liberty, indeed are under a solemn duty, to look at the sub stance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If therefore a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution. * * * Undoubtedly the State when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the government."

In Railroad Co. vs. Husen, 95 U. S. 465, the Supreme Court of the United States speaking of the duty of the court to inquire whether the statute violated the constitution, and the claim here urged that the legislature and not the court is the judge in this matter, said at page 473:

"That inquiry they (certain State courts) have said was for the legislature and not for the courts. With this we cannot concur. The police power of the State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise and under color of it. Objects not within the scope cannot be secured at the expense of the protection afforded by the federal constitution, and as its range sometimes comes very near the field committed by the constitution to congress, *it is the duty of the courts to guard vigilantly against any needless intrusion.*"

In re Jacobs, 98 N. Y. 98, the court said:

"Under the mere guise of police regulations personal and private property cannot be arbitrarily invaded, and the determination of the legislature is not final and conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of a citizen and interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in the body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts and they must yet determine and enforce the supreme law."

REVIEW OF APPELLANT'S AUTHORITIES.

The appellant in support of his contention cites:

The Slaughter House Cases, 16 Wallace, 36–63.
Patterson vs. Kentucky, 97 U. S. 501.
Powell vs. Pennsylvania, 127 U. S. 678.
Butler vs. Chambers, 36 Minn. 72.
Woodruff vs Parham, 8 Wallace, 129.
Mugler vs. Kansas, 123 U. S. 623.
Leisey vs. Hardin, Iowa Sup. Ct., Oct. 4, 1889.
Beer Co. vs. Massachusetts, 97 U. S. 32.
Fertilizing Co. vs. Hyde Park, 97 U. S. 659.
Butchers' Union Co. vs. Crescent City Co., 111 U. S. 746.

None of these cases consider or decide the questions at issue in this case. None of them are in point.

In the Slaughter House Cases, 16 Wall. 36–63, the State of Louisiana granted to a corporation the exclusive right to slaughter cattle in New Orleans and one or two adjacent parishes, accompanied with provisions requiring them to furnish proper accommodations for slaughtering, and requiring all animals intended for slaughter in that district to be brought there for slaughter.

The parties opposing the law were citizens of Louisiana, butchers living in New Orleans.

The only question raised or decided was whether this law violated the rights and privileges of those citizens under the fourteenth amendment to the constitution (page 66), and the cases were decided on the ground "that the rights claimed by the plaintiffs in error, if they had any, were not privileges and immu-

nities of citizens of the United States within the meaning of the fourteenth amendment under consideration." (Pages 74: 80, opinion.)

These cases are not in point therefore, because

1st. No question of a violation of the commercial clause was or could be raised.

2d. The cattle of other States were allowed to be handled, slaughtered and sold on the same terms as those of Louisiana. So the question of discriminating against the citizens or products of other States was not raised, nor were the citizens of other States prohibited from slaughtering their cattle at home and trading in their products.

The law was a simple regulation of slaughter houses in a great city, such as any city may pass, and the cases raised no question presented in this case.

Patterson vs. Kentucky, 97 U S. 501, was a case where the State, deeming it necessary to protect its people against explosive oils, passed a law providing for the inspection of all illuminating oil and forbidding the sale of the dangerous oil which failed to stand what it deemed the necessary test.

A citizen of Kentucky who under U. S. patent had made some poor oil that would not stand the test, assailed the law, and against him it was held a valid inspection law, as it certainly was.

This case is not in point, because—

1st. The Kentucky law was a proper inspection law. It provided means to separate the dangerous oil from the harmless, and prohibited the sale of that of poor quality and permitted that of good quality wherever made.

Had it prohibited the sale of all oil, good or bad, that was not drawn out of land that had been inspected in the State of Kentucky within twenty-four hours before it was drawn, it would have been like the Minnesota law and void.

2d. The commercial clause of the constitution was not in question.

3d. There was no discrimination against the citizens or products of other States in the Kentucky law.

Powell vs. Pennsylvania, 127 U. S. 678;

Butler vs. Chambers, 36 Minn. 72;

Mugler vs. Kansas, 123 U. S. 623;

Leisey vs. Hardin, Iowa Sup. Ct., Oct. 4, 1889,

are the oleomargarine and liquor cases, and they are not in point here, because—

1st. Had the legal questions presented in these cases been presented under a law prohibiting the manufacture, sale or use of fresh dressed beef, they would have been decided in favor of the citizen and against the law, so radical is the difference between the articles.

The only question determined in the first three cases above mentioned is whether a citizen of the State which enacts the law prohibiting the sale of intoxicating liquors or oleomargarine can in the sale of the products of his own State disregard it on the ground that it violates the fourteenth amendment which says: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

These cases decide that such a citizen selling the products of his own State must obey such a law and that it does not abridge his privileges and immunities.

But on what ground do they so decide?

On the ground that intoxicating liquors and oleomargarine are articles of such a character that it is at least a doubtful question whether the public morals, the public health and the public comfort are not injured by their sale or use at all, and that in such a case the legislature may decide as to its *own citizens* and *such products of its* own State (for the court must bear in mind that no question of interstate commerce, and no question of the rights of citizens or products of other States was in these cases), whether they shall be used or sold, and that a person who has permitted himself to become a citizen of such a State has by so doing surrendered his privileges and immunities to that extent to his adopted State.

In Mugler vs. Kansas, 123 U. S. 662, the U. S. Supreme Court plainly states this position when it says:

"There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact within the knowledge of all, *that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the facts established by statistics accessible to every one that the idleness, disorder, pauperism and crime existing in the country are*, in some degree at least, traceable to this evil."

And the court proceeds to say that if on this ground the State prohibits, the court will not override the legislative will. Indeed, the manufacture and sale of intoxicating liquors has always been under police

control. It has been prohibited on holidays, and the dealers in it have long been required to have a special license from the State.

In Butler vs. Chambers, 36 Minn. 72, the Minnesota Supreme Court said:

"In People vs. Arensburg, 40 Hun. 358, a conviction for the violation of the New York act was sustained on the ground that the legislature might not only interpose to protect the public health, *but to prevent fraud and imposition in the simulation of a healthy article of food universally consumed by the people; and upon this proposition we are disposed to rest our decision in this case.*"

And at page 73, speaking of substitutes for butter, it said:

"It is doubtless easy to introduce cheap and unwholesome ingredients into their manufacture, and the product is easily passed off on the consumer under the semblance of butter without detection or fraud."

In Powell vs. Pennsylvania, 127 U. S., at page 684, the doubtful character of oleomargarine is recognized, and the court said as to the offer of the accused to prove that his particular oleomargarine was wholesome:

"It is entirely consistent with that offer that many, indeed that most kinds of oleomargarine butter in the market contained ingredients that are or may become injurious to health. *The court cannot say from anything of which it may take judicial cognizance that such is not the fact.*" * * *

In the syllabus the court said:

"Whether the manufacture of oleomargarine or imitation butter of the kind described in the statute is or

may be conducted with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to public health as to require for the protection of the people the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and public policy which belong to the legislative department to determine."

And the court held in effect that because *it did not appear from the face of the statute, or from any facts of which the court could take judicial cognizance, that the law infringed rights secured by the fundamental law*, the legislative determination of these questions bound a citizen of that State as to a manufactured product of that State.

Now how widely different from intoxicating liquors and oleomargarine is fresh dressed beef?

Suppose a State had prohibited the manufacture, sale or eating of all fresh dressed meats, and some citizens of that State even had raised the question of the validity of such a law under the fourteenth amendment—how much of these decisions would be in point?

When was the vendor of fresh dressed meats ever required to prove his character and get a special license from the State? When was he ever forbidden to sell on election days, holidays, or to minors?

When did it become "a fact within the knowledge of all, that the public health, the public morals or the public safety might be endangered by the general use of fresh dressed beef?"

When were "the facts established by statistics accessible to every one that the idleness, disorder, pau-

perism and crime existing in the country are in some degree at least traceable to eating fresh dressed beef?"

When did fresh dressed beef ever become the "fraudulent simulation of a healthy article of food universally consumed by the people?" (36 Minn. 72.)

When were "cheap and unwholesome ingredients easily or at all introduced into its manufacture?"

While the United States Supreme Court says it cannot take judicial notice of the fact that many—perhaps most kinds of oleomargarine butter in the market do not contain ingredients that are or may become injurious to health (127 U. S. 674), and while it does not appear from the face of the oleomargarine statute or from any facts of which that court could take judicial cognizance, that it infringed the rights of the citizens or products of the State enacting the law under the fourteenth amendment, and while the presumption against the wholesomeness of oleomargarine was so strong in the judicial mind that proof of the wholesomeness of a single article could not overcome it—it is to our mind clear and certain that that court and all courts must and will take judicial cognizance of the wholesomeness of fresh dressed beef, and that the presumption *against* the validity of a law prohibiting its importation or sale is as great as was that in favor of the oleomargarine law, and that in order to sustain such a law *it must be proved not only that the beef in question in the case, but all fresh dressed beef shut out by such a law, is diseased and dangerous to health.*

Indeed the Supreme Court itself has said it. In Kimmish vs. Ball, 129 U. S. 221–2, discussing R. R. Co. vs. Husen, 95 U. S., where it took judicial notice that Texas, Mexican and Indian cattle were

wholesome, and annulled a law prohibiting commerce in them, it says in substance that the only thing that could save such a law would be proof that all such cattle were diseased.

Certainly the presumption in favor of fresh dressed beef is greater than that in favor of live cattle, for the vitals, entrails, blood, all the disease producing parts, have been removed.

We maintain, therefore, that under these decisions, it is clear that fresh dressed beef is not to be classed with intoxicating liquors or oleomargarine, and that upon the question of the validity of a law prohibiting its manufacture, use or sale, the decision of all courts must be against the law under the fourteenth amendment alone.

2d. The laws under consideration in these four cases prohibited the manufacture and sale of all liquor or oleomargarine whether produced or owned in or out of the States passing the laws. There was no discrimination against the citizens or products of other States.

But the Minnesota law prohibits commerce in all manufactured products mentioned in it that are produced in other States, while it permits it in like manufactured products of its own State, thus discriminating against the citizens of other States who own, as in the case at bar, their products, and in favor of her own citizens.

3d. In the first three cases we are discussing, the commercial clause of the constitution was not in question. It is not referred to except in Butler vs. Chambers, 36 Minn. 72, and what is said there is *obiter dictum*, and the decision is distinctly placed on another ground. The cases all arose between citizens of the

States enacting the laws and their respective States, and over products of those States. No question of conflict of the federal and State jurisdiction over the subject matter arose or was considered, and therefore they do not reach that question.

We have cited the authorities which prove that the Minnesota law is void because congress alone has power to regulate interstate commerce in so well known an article of commerce as fresh dressed beef. (See Points I, II, supra.) There is nothing in these decisions to the contrary.

In the case of Leisey vs. Hardin, the Iowa Supreme Court, like the legislatures and people of that State, flies in the face of all reason and authority when intoxicating liquors are mentioned.

It holds that that State may prohibit the sale of imported liquors in unbroken cases. No authorities outside of Iowa are cited to sustain it, and it will be reversed as soon as the case reaches Washington. The law on the subject is settled for this country, and this decision is a mere partisan attempt of that court to advance for the moment the present ism of Iowa. (See Point IV, supra.)

The case is not in point in any event on the first two grounds above named.

Woodruff vs. Parham, 8 Wall. 129, was the case of a tax on *all* sales at auction.

It is not in point because—

1st. The law which simply imposed a tax on all auction sales did not prohibit the importation or sale, or unnecessarily burden the commerce in the products of other States.

2nd. It did not discriminate against the citizens or products of other States, but treated them exactly as it did the products of that State.

Beer Co. vs. Massachusetts, 97 U. S. 33;
Fertilizing Co. vs. Hyde Park, 97 U. S. 659;
Stone vs. Mississippi, 101 U. S. 814; and
Butchers Union Co. vs. Crescent City Co., 111 U. S. 746,

were all cases where the States or municipalities had in terms granted monopolies to certain corporations, and subsequently the States and municipalities in the exercise of their police power passed acts depriving the corporations of some parts of their monopolies. The corporations appealed to the courts on the ground that these later acts impaired the obligation of their contracts.

The cases were all decided, not on the ground that the police power was superior to the constitution and authorized the States and cities to impair the obligations of their contracts at will, but on the ground that there never were any contracts to impair; that it was not in the power of the States and cities to make such contracts, create such monopolies, and grant by contract to private corporations their right to protect the health of their citizens.

Beer Co. vs. Massachusetts, 97 U. S. 28:33.
Butchers Union Co. vs. Crescent City Co., 111 U. S. 752.
Fertilizing Co. vs. Hyde Park, 97 U. S. 670.
Stone vs. Mississippi, 101 U. S. 819.

These cases have no bearing upon the question at bar whatever.

It remains to notice a few of the claims of appellant's counsel.

A.

It is persistently urged by appellant's counsel that there is no way in which sound dressed beef can be distinguished from unsound except by an inspection of the live animal by a local inspector in Minnesota within twenty-four hours of slaughter. (Page 9 Brief.)

We deny this proposition.

We submit, that the court cannot take judicial notice that this proposition is true, and that it must take judicial notice that it is false. It must take judicial notice of the following facts:

1st. The fresh meats consumed by Minnesotians were never inspected on the hoof by State or city inspectors before April, 1889, yet population has increased and the death rate has been low.

2d. No disease or pestilence traceable to eating fresh meats has ever visited the State or its people, or the people of any part of the Union.

3d. Fresh dressed beef has been used for human food, without government inspection on the hoof, from time immemorial, by both savage and civilized men, and no disease or death has resulted from it.

4th. Minnesota does not possess all the wisdom and knowledge on earth as to inspection of cattle, and sound beef taken from a steer that has been inspected and found healthy within 24 hours of slaughter by a State inspector of Illinois, is entitled to the benefit of the Minnesota market as much as if the steer had been inspected here.

These things the court must take judicial notice of, and they are sufficient to prove that there was *no vital necessity* for such a law.

Chy Lung vs. Freeman, 92 U. S. 275:280.

There are other considerations here which the court should bear in mind.

If the State can prohibit interstate commerce in beef, unless the live stock is first inspected here, it may in fish unless they are first inspected when caught. It may in butter and cheese and milk and leather, unless the cow from which they are drawn is first inspected here. It may in wool and all clothing made from it, unless the sheep is first here inspected. It may in cotton and clothing made from it, unless the cotton and the ground that produces it is inspected in Minnesota before the cotton is picked; and there is no product of the agriculture or manufactures of other States that this State may not thus exclude; none of this State that every other may not exclude.

The argument of the learned General here, as Judge Blodgett well remarks, is more specious than sound, and cannot prevail. (See 39 N.W. Rep. 636.)

B.

Another argument presented is that this law does not exclude dressed beef made in another State, because it permits cattle to be brought here from another State and slaughtered, and it is claimed that cattle are simply *another form* of dressed beef, and that it is within the province of an inspection law to prescribe the *form* in which the article may be sold. (Pages 9:17:43, Brief.)

In Turner vs. Maryland, 107 U. S. 105, the court said:

"Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions and weight of package, and mode of putting up and marking or branding of various kinds."

But we think it is rather too great a stretch of this power of inspection for the State to meet a piece of fresh meat at the borders of the State and require it to be put into the form of a live ox before it can be imported or sold.

Fresh dressed beef is one article of commerce; live cattle is another; but live cattle are not another form of dressed beef. Milk, butter, hides, leather, cheese, tripe, sausage, horns, are all articles of commerce; they are all products derived from cattle; but live cattle are not another form of milk, butter, &c.; nor is it any defense for a law which violates the constitution by prohibiting interstate commerce in one of the best known articles of commerce, that it does not prohibit it in any or all others.

C.

It is repeatedly urged that the State may enact inspection laws and may prescribe reasonable means through those laws of ascertaining whether a given article is sound or unsound, and may reject the unsound because it does not belong to commerce, and that this law is one of these reasonable means.

Pages 19:31, Brief.

Now, we deny this proposition *in toto*, on the ground that over a well recognized article of commerce congress alone has jurisdiction, and every

interference with interstate commerce in it is void. (Points I, II, supra.)

But if the proposition were admitted, this law which prohibits *interstate commerce* in all fresh dressed meats produced in other States, but permits the use and consumption thereof by its people without inspection, permits the same meat excluded while fresh to be imported and sold without inspection when seasoned with a little salt or covered with a little tin, which permits commerce in a like product of Minnesota while prohibiting it in the same product inspected in the same way in Illinois, *is not a reasonable or any means* of ascertaining whether the article belongs to commerce or not, or of excluding it if found deleterious to the health or morals of the community.

It is a studied attempt how *not* to ascertain *that fact*, and its every line shows that its sole object and only effect is to ascertain what fresh dressed meats belong to interstate commerce and what belong to State commerce, and to prohibit commerce in the former and permit it in the latter. It is void in any view. (Point VII, 2d, 3d, supra.)

D.

Again, our learned opponent argues that this law in no way interferes with interstate commerce, because it only acts upon the article by prohibiting its sale after its arrival in the State, and that this in no way affects interstate commerce in it.

Henderson vs. Mayor, 92 U. S. 259, passed on such a law. It required the master of a vessel to do nothing and pay nothing until twenty-four hours after his passengers were landed in the State, and then it re-

quired him to pay for the privilege of landing his passengers. The same argument was urged there; but the court said, at page 274:

"The effective operation of the law commences at the other end of the voyage. The master requires of the passenger, before he is admitted on board, a part of the passage money which he knows he must pay for the privilege of landing him in New York," and the law was held void.

So here, the prohibition of the sale of this article of commerce on its arrival in Minnesota commences its effective operation at the other end of the voyage, and absolutely prevents the importation. It has, and its sole purpose was to have the same effect as if it had provided, "No fresh dressed meats from other States shall be imported into the State of Minnesota;" for who will import if he may not sell? All the cunning verbiage of the law and its title are simply to conceal and yet effect this one object.

E.

We think the propositions upon pages 40 and 41 of appellant's brief are unsound, and the learned counsel has certainly been very unfortunate in citing authorities to sustain them.

1st. Beer Co. vs. Massachusetts, 97 U. S. 33; Hyde Park vs. Fertilizing Co., 97 U. S. 670; Butchers Union Co. vs. Crescent City Co., 111 U. S. 752, do *not* hold that the constitutional prohibition against a law impairing the obligation of contracts yields to the police power of the State. On the other hand, those cases all hold that the contracts which it was claimed were impaired by the second action of the

State never in fact existed, because it was not within the power of the States to make the contracts or grant the monopolies to private corporations there claimed to have been made and granted. This is unquestionably the law. But it does not follow that because a grant of governmental powers to a private individual is void, all the grants made by the States to the United States are also void whenever the States choose to use their power to protect their people: such a rule dissolves the union. And one step more, that the safety of the individual is the highest law, and that whenever the individual deems it necessary to do any act to protect his safety, his health or his comfort, his power is superior to that of the State, resolves government and society into anarchy and barbarism.

2d. Powell vs. Pennsylvania, 127 U. S. 686, does *not* hold that a "citizen of New York, while he may import, cannot sell a pound of oleomargarine in Pennsylvania because in the exercise of the police power the latter State has absolutely prohibited its sale." No such question arose, for the citizen and product in that case were both of Pennsylvania.

Again, if that question had arisen it could be truthfully said in that case that under that law the citizens of other States enjoyed the same privileges and immunities as the citizens of Pennsylvania. But under the law here in question interstate commerce by the citizens of other States in the products of their States is absolutely prohibited, while that same commerce is permitted to the citizens of Minnesota in the products of its State.

3d. Patterson vs. Kentucky, 97 U. S. 501, does *not* hold that "a citizen of New York who has a patent

for an illuminating oil cannot sell it in Kentucky, because in the exercise of the police power for the protection of the lives of her citizens she has absolutely prohibited its sale." For in that case it was not claimed that either Mr. Patterson or his product were of any other State than Kentucky (page 503), so the rights of citizens of other States were not in question.

Again, the same test and the same prohibition under the Kentucky law applied to the citizens and products of other States that applied to the citizens and products of Kentucky, so there was no discrimination, and the Kentucky law was a reasonable inspection law, by means of which harmless oil could be separated from explosive, while the law in question in this case, as we have shown, meets none of these requirements.

4th. Mugler vs. Kansas, 126 U. S. 623, does *not* hold that a "citizen of New York owning a brewery in Kansas can neither use it nor recover for its destruction by the exercise of the police power of the State, declaring that beer shall neither be manufactured nor sold," nor was any such question in that case. Mr. Mugler was a citizen of the State of Kansas. (Page 626.)

In that case it was properly held that "a prohibition simply upon the use of property of a citizen of that State for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community, could not in any just sense be deemed a taking or an appropropriation of property for the public benefit." (Pages 668-9.)

It had been held ever since the opinion of Mr. Justice Miller in the Slaughter House Cases, 16 Wal-

lace, pages 74:80, that a person who has permitted himself to become a citizen of such a State has by so doing surrendered the privileges and immunities he held as a citizen of the United States to such an extent to his adopted State by becoming its citizen, that he could claim no special privileges and immunities under the fourteenth amendment to the constitution as against such legislation, and it was therefore held in this case that no right, privilege or immunity secured to Mr. Mugler by the constitution of the United States was infringed. (Page 675.)

Here certainly was no holding that private property could be taken for public use without just compensation under the police power of the State, notwithstanding the constitution, but a plain decision that no private preperty *had* been taken for public use.

5th. Infected goods and diseased meats do not belong to commerce; they are not articles of commerce, hence their importation and sale may be prohibited by the States, and they may use means suitable for the purpose to separate such goods and meats from the sound and wholesome, but they cannot for this purpose prohibit interstate commerce in *all* goods or in *all* meats. They cannot prohibit either the importation or sale by the importer of *any sound article of commerce*, under the pretense that there may be some portion of the article that is unsound. "They may not under the cover of exerting their police powers substantially prohibit or burden either foreign or interstate commerce." Bowman vs. Chicago Ry. Co., 125 U. S. 491:493:495:497.

The above case holds no other doctrine, and the

counsel's citation of it is unfortunate. To his question, "Whence comes the peculiar omnipotence of the commercial clause to strike down the police power of the State, which confessedly does not exist in regard to the other clauses of the constitution?" (page 41, Brief), we answer—

1st. The omnipotence of the commercial clause comes from the letter of the constitution itself, which is the supreme law of the land, and which grants the power to regulate commerce to congress *exclusively, without any limitation or reservation whatever* (see Point VII, 1st), and by this clause the States *have surrendered* to the United States the *sovereign police power over commerce* to be exercised by congress.

Passenger Cases, 7th Howard, 426-7.

Railroad Co. vs. Husen, 95 U. S. 471-2.

2d. The omnipotence of the commercial clause rests also upon the uniform decisions of the courts, which have always jealously guarded the exclusive power of congress to regulate commerce, and have promptly adjudged void every interference of the States therewith in every case where the subject, like dressed meats, is in its nature national and susceptible of regulation by rules uniform throughout the nation. (See Points I and II, *supra*.)

3d. We do not confess but deny that the police power of the States is in any case superior to any of the other clauses of the constitution of the United States, and we submit that we have shown that the authorities that the learned counsel has cited hold no such doctrine, but simply hold that the action of the States in those cases did not violate the clauses of the constitution respectively in question.

F.

In answer to the stirring appeal which is found in the last paragraph of the learned counsel's brief, we might say:

Within the last three years two gigantic corporations composed of the wealthiest and most influential citizens of the State of Minnesota have constructed vast shambles in the cities of St. Paul and Minneapolis, and conceived a far-reaching scheme by which to their hoarded millions they hope to add millions more. Financially powerful and politically omnipotent in our State, legislatures are in their presence like reeds before the wind. Already they have passed this law, which puts in their absolute control the prices at which all fresh meats in Minnesota shall be sold to consumers, and places no limit but their own greed upon the millions that shall fill their coffers.

The prices of fresh meats to the consumers advance in the State until already the leading inn-keepers and wealthier families of the State are forced to purchase their supplies for consumption in Kansas City and Chicago, where the competition of the world keeps them cheap, while men of moderate means and the sons of unremitting toil are compelled to feed themselves and families largely upon the canned and cured meats happily not yet in the grasp of these monopolies.

Nor is this the end. When next the legislature meets it is proposed, we expect, to protect the health and public safety of the citizens of other States against the pure blood shorthorns reared and pampered for exhibition in Minnesota (page 8, appellant's

brief,) by providing through another law that no live cattle raised in the State of Minnesota shall be shipped or sold to any one beyond the boundaries of the State, until they have been inspected by local Minnesota inspectors at the shambles of these corporations within twenty-four hours *after* their slaughter; and this to the end that the producers of Minnesota may contribute their proper share, as the consumers are now doing, to the wealth of this all-powerful combination. Flushed with success and easily triumphant in every branch of our State government except in the judicial, they stand now before this court, ably, honorably and properly represented by their learned counsel, who properly appears for the State (for in money and influence they *are* the State), and, shouting the misleading motto, "*salus populi suprema lex*," they demand that this court, to gratify their overweening avarice, shall set the seal of its approval upon that hated doctrine of nullification which the wisdom and patriotism of a century have condemned. Will the court do this? *That* is the question.

The above is no fancy picture, and this *is* the question for the court; but we place our argument in this case upon what we deem a higher plane. The court to which we are now addressing ourselves we know considers neither the passions, prejudices or jealousies of rival corporations, States or people, and we congratulate ourselves that in the consideration of this case we shall get that calm and judicial consideration and declaration of the law as it is by the grants made under the constitution, and by the repeated decisions of the courts, which alone we seek. And in this be-

lief we rest our case in conclusion upon no appeal to passion or prejudice, but upon these well established principles of law:

1st. Sound and wholesome fresh dressed beef is a well recognized article of interstate commerce, national in its character, and subject to regulation by one uniform system of rules throughout the United States.

2d. Over such a subject matter the power of congress to regulate commerce among the several States is exclusive, and this law, which absolutely prohibits the sale of this article when produced in another State than Minnesota, and which thereby prohibits interstate commerce in it (see Point IV, *supra*), is unconstitutional and void, because it violates the commercial clause of the constitution. (Points I–IV, *supra*.)

3d. This law permits commerce in this manufactured product when dressed in Minnesota, but prohibits it in the product when dressed in other States, and thereby deprives the citizens and products of other States of the privileges and immunities enjoyed by the citizens of Minnesota, and is therefore void. (Point VI, *supra*.)

4th. This law cannot be sustained as an inspection law, for the court must take judicial notice that fresh dressed meats are ordinarily nutritious and wholesome; that no pestilence or disease has generally prevailed in Minnesota or any other State from their use or abuse; that from time immemorial both the savage and civilized man has used them without deleterious effect and without inspection on the hoof, and that this custom prevailed in Minnesota until April, 1889; that this law permits the consumption and use by the citizens of the State of the fresh meats produced in

other States, while it prohibits simply their sale; that it permits interstate commerce in these same meats without any inspection as soon as they are salted, smoked or canned; that the sale and use of canned and cured meats without inspection is more dangerous than the sale and use of fresh meats; that no evidence was introduced in this case that *all* fresh dressed meats produced without the State were diseased, infected or injurious to health; that this law does not seek to separate the sound dressed meats from the unsound, but uses the means to separate only the products of other States from the products of this State, and prohibits commerce in the former regardless of their character.

From these facts, of which the court must take judicial notice, the conclusive presumption arises in this case, as it did in Railroad Company vs. Husen, 97 U. S. 464:471-3, (only with greater force, by as much as the dressed product of the animal, freed from its blood, its entrails and it vitals, is less likely to produce disease than is the live animal), that this law was *not* enacted for the purpose of protecting, and does not use suitable means to protect the public health or safety, but under this mere pretense is directed to the protection of the manufactured products of Minnesota against the manufactured products of other States.

And this presumption is so strong, so conclusive from the foregoing facts of which the court must take judicial notice, that it sweeps away the pretended presumption spoken of at the foot of page 45 of appellant's brief, in favor of the law resulting from the mere fact that the legislature passed it. To overcome this presumption against the law, there must have

been proof that *all* dressed meats from other States were infected with disease, or so generally infected that it would have been impossible to separate the healthy from the diseased.

Kimmish vs. Ball, 129 U. S. 221.
Railroad Co. vs. Husen, 95 U. S. 473.
Point VII, supra.

No such proof was or could be produced, because the fact is otherwise.

We respectfully submit that the judgment below should be affirmed.

St. Paul, Nov. 12, 1889.

Walter H. Sanborn

WALTER H. SANBORN,
Attorney for Respondent.

Office Supreme Court, U. S.
FILED,
JAN 8 1890
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1889.

NO. 1346.

THE STATE OF MINNESOTA, *Appellant*,

vs.

HENRY E. BARBER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF

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BRIEF FOR APPELLEE.

STATEMENT.

The appellee, Henry E. Barber, on September 16, 1889, filed his petition in the Circuit Court of the United States for the District of Minnesota, alleging that he was unlawfully restrained of his liberty by the sheriff of Ramsey County, Minnesota, setting forth the pretended cause of restraint, and praying for a writ of *habeas corpus* and a discharge from such unlawful restraint and imprisonment.

A writ of *habeas corpus*, pursuant to the prayer of the petition, was issued and served on the sheriff of Ramsey County, who produced the body of said appellee before the judge of the United States Circuit Court, and returned that he,

as sheriff of said Ramsey County and a keeper of the common jail, held said appellee by virtue of a writ of commitment from one of the justices of the peace in and for said county, as follows:

"STATE OF MINNESOTA, } ss.
"County of Ramsey. }

"The State of Minnesota to any constable and the keeper of the common jail of said county:

"Whereas, a justice court held at my office, in said county, for the trial of Henry E. Barber for the offense hereafter stated, the said Henry E. Barber was convicted of having on the 16th day of September, A. D. 1889, in the said county, wrongfully and unlawfully offered and exposed for sale, and having sold for human food a certain quantity, to-wit, one hundred pounds, of fresh uncured beef, which said beef was then and there a part of an animal which had been slaughtered in the State of Illinois, and which animal had not been inspected and certified before slaughter by an inspector appointed under the laws of the State of Minnesota, and upon conviction the said court did adjudge and determine that the said Henry E. Barber be duly imprisoned in the common jail of said county for the period of thirty days. Therefore you, the said constable, are commanded forthwith to convey the said Henry E. Barber to the said keeper, and you, the said keeper, are hereby commanded to receive the said Henry E. Barber into your custody in the said jail, and to confine him therein for the period of thirty days from this date, or until he shall be thence discharged by due course of law.

"Given under my hand this 16th day of September, A. D. 1889.

[Signed] WILLIAM CLARK,
"Justice of the Peace."

Thereupon the question of the legality of such commitment and imprisonment of the appellee was argued and submitted to the Circuit Court, which took the same under advisement, and afterwards, and on September 23, 1889, ordered the discharge of the prisoner, and rendered final judgment accordingly, from which the State of Minnesota duly appealed to this court.

From the petition of the appellee for the writ of *habeas corpus*, the order of commitment, and the opinion of the circuit judge, copies of which appear in the printed transcript of record, it appears that the appellee was charged with, and convicted of, a violation of an act of the legislature of the State of Minnesota, entitled, "An act for the "protection of the public health by providing for "the inspection of cattle, sheep and swine, designed "for slaughter for human food," and approved April 16, 1889; which act is as follows:

"SECTION 1. The sale of any fresh beef, veal, mutton, lamb or pork for human food in this state, except as hereinafter provided, is hereby prohibited.

"SECTION 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs and townships within this state, to appoint one or more inspectors of cattle, sheep and swine, for said city, village, borough or township, who shall hold their offices for one year, and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially co-extensive with the board so appointing them; and said several boards shall regulate the

form of certificate to be issued by such inspectors and the fees to be paid them by the person applying for such inspection, which fees shall be no greater than are actually necessary to defray the costs of the inspection provided for in section three (3) of this act.

"SECTION 3. It shall be the duty of the inspectors appointed hereunder to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions, within twenty-four hours before the slaughter of the same, and if found healthy and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect. If found unfit for food by reason of infectious disease, such inspectors shall order the immediate removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

"SECTION 4. Any person who shall sell, expose or offer for sale for human food, in this state, any fresh beef, veal, mutton, lamb or pork whatsoever, which has not been taken from an animal inspected and certified before slaughter by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred (100) dollars, or by imprisonment not exceeding three months for each offense.

"SECTION 5. Each and every certificate made by inspectors under the provisions of this act shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were at the date of such inspection, free from all indication of disease, apparently in good health and in fit condition when inspected to be slaughtered for human food; a duplicate of which certifii-

cate shall be preserved in the office of the inspector.

"SECTION 6. Any inspector making a false certificate shall be liable to a fine of not less than ten (10) dollars nor more than fifty (50) dollars for each animal falsely certified to be fit for human food under the provisions of this act.

"SECTION 7. This act shall take effect and be in force from and after its passage.

"Approved April 16, A. D. 1889."

The violation charged in the complaint, and for which the appellee was convicted, consisted in his having wrongfully and unlawfully offered and exposed for sale, and sold for human food, in said County of Ramsey, "a certain quantity, to-wit: one hundred "pounds, of fresh uncured beef, which said beef "was then and there a part of an animal which had "been slaughtered in the State of Illinois, and had "not been inspected and certified before slaughter "by an inspector appointed under the laws of the "State of Minnesota."

The petition for the writ contained the following admission:

"Your petitioner further shows that at the time and place charged in said affidavit and complaint he offered for sale and actually sold a quantity of fresh uncured beef, then and there intended the same for consumption as human food in said County of Ramsey and State of Minnesota, which beef was the part of an animal which had been slaughtered in the State of Illinois and therefrom carried to said County of Ramsey and State of Minnesota, and was perfectly healthy and in all respects proper and suitable for human food, but said

animal had not been inspected alive within said County of Ramsey nor within said State of Minnesota, where he offered and sold said beef as aforesaid, by any inspector or his deputy appointed under any law of the State of Minnesota, although prior to the time he offered and exposed said beef for sale inspectors had been appointed under the act aforesaid, who were then and there ready and willing to make inspection as by said act provided.

"Your petitioner further shows that said beef so sold by him was the property of Armour & Co., a co-partnership for whom your petitioner is the agent, all the members of which co-partnership are citizens of the State of Illinois, and who now are and for a long time past have been engaged at Chicago, in the State of Illinois, in the business of slaughtering cattle at the said City of Chicago and shipping the fresh beef therefrom into various states of the United States and there selling the same for human food."

ARGUMENT.

I.

THE QUESTION STATED.

The complaint does not charge, nor does the writ of commitment state, that the dressed beef offered for sale by appellee was not sound, wholesome and fit for human food. Nor do they charge that the animal was not inspected before slaughter. The allegation is that the beef sold was "a part of "an animal which had been slaughtered in the State "of Illinois, *and which animal had not been inspected "and certified before slaughter by an inspector ap- "pointed under the laws of the State of Minnesota.*"

Nor does the statute prohibit, or undertake to punish for, the introduction or sale of diseased or unwholesome meats. It prohibits, and punishes for the sale, exposure or offer for sale, for human food in the State of Minnesota of "any fresh beef, "mutton, lamb or pork whatsoever, which has not "been taken from an animal inspected and certified "*before slaughter* by the proper inspector appointed" under the provisions of the act in question. That is, the animal must have been inspected *in the State of Minnesota by one of its local inspectors within twenty-four (24) hours before slaughter.*

Under this act the offering for sale, or selling, fresh beef for human food within the State of Min-

nesota is made a crime, without any evidence tending to show that the meat is diseased or unwholesome; and the crime under the act is complete, even though the person offering the meat for sale should prove conclusively that it was brought from another state, was sound and wholesome, and had been ascertained so to be by an inspection in that state of the animal before slaughtering, as well as by an inspection of the meat after being dressed.

In this case there was no charge in the complaint, nor, as we understand, any attempt to prove, either that the dressed beef in question was not sound, wholesome and fit for human food, or that the animal had not been inspected at the place of, prior to, and near the time of, slaughter. The whole charge was based, as indeed it was necessary to base it, upon the single fact that the beef in question was taken from an animal slaughtered in the State of Illinois and shipped to Minnesota for sale, and therefore not inspected alive within that State in accordance with the provisions of the act. The question then for adjudication by this court is this:

Can the State of Minnesota, under the guise of its police power, prohibit the sale within that state of sound and wholesome dressed beef brought there for sale from another state, upon the sole ground that the animal was not inspected alive within the State of Minnesota and within twenty-four hours before slaughtering?

Or to state the question in another way:

Can the State of Minnesota prohibit the introduction for sale within its borders, or the sale, of any sound and wholesome dressed beef, by requiring a condition with which the non-resident dealer cannot possibly comply, namely, an inspection of the live animal within the State of Minnesota within twenty-four hours before slaughter?

In the discussion of this question we submit the following propositions, which we believe are well supported by repeated decisions of this court, as well as others, and altogether conclusive of the matter in dispute.

II.

The effect of the act in question is to establish non-intercourse between the people of Minnesota and those of other states with respect to a known article of commerce, to-wit, Sound and wholesome fresh meats, and it is therefore unconstitutional.

This prohibition is accomplished, not by a direct and positive enactment, but quite as effectually by imposing, as a condition precedent to the right to sell such articles in Minnesota, a requirement with which the non-resident cannot possibly comply. Of course, it goes without saying that a citizen of Missouri or of Illinois cannot transport his beef cattle to Minnesota and there have them inspected and return them to his place of slaughter,

all within twenty-four hours. And even if this were possible, as we shall presently see it would impose upon the non-resident an unequal and unreasonable burden, and would be an unconstitutional discrimination against him and in favor of a citizen of Minnesota. We take it for granted, therefore, that the effect and evident intention of the act are to prohibit altogether the importation of fresh dressed meats from other states and territories into the State of Minnesota for sale.

In *Henderson vs. Mayor of New York*, 92 U. S. 268, it is said: "In whatever language a statute "may be framed, its purpose must be determined "by is natural and reasonable effect."

Beyond all question this statute of Minnesota is a regulation of interstate commerce, and therefore unconstitutional and void, unless it can be upheld as a proper exercise by the state of its police power.

The provision of the Federal Constitution which declares "The Congress shall have power to "regulate commerce among the several states," known as the "commercial clause," has been very often construed by this court, and certain points have been so fully settled as to be no longer subject to controversy. Some of the results of these adjudications were thus stated by this court in the case of *Walling vs. Michigan*, 116 U. S. 455:

"We have so often held that the power given

"to Congress to regulate commerce with foreign "nations, among the several states and with the "Indian tribes, is exclusive in all matters which "require, or only admit of, general and uniform "rules, and especially as regards any impediment "or restriction upon such commerce, that we "deem it necessary merely to refer to our previ- "ous decisions on the subject, the most important "of which are collected in *Brown vs. Houston*, "114 U. S. 622, 631, and need not be cited here. "We have also repeatedly held that so long as Con- "gress does not pass any law to regulate commerce "among the several states, it thereby indicates its "will that such commerce shall be free and untram- "melled, and that any regulation of the subject by "the states, except in matters of local concern only, "is repugnant to such freedom."

It is also settled beyond dispute that this commerce among the states, the regulation of which is vested exclusively in Congress, includes all trade, traffic, transportation, travel and intercourse between the people of the several states or any two of them.

Gibbons vs. Ogden, 9 Wheaton, 1.
Brown vs. Maryland, 12 Wheaton, 419.
Welton vs. Missouri, 1 Otto, 275.
Passenger Cases, 7 Howard, 283.
R. R. Co. vs. Husen, 95 U. S. 465.
Henderson vs. Mayor of New York, 2 Otto, 259.
Chy Lung vs. Freeman, 2 Otto, 275.
The License Cases, 5 Howard, 504.
State Freight Tax Case, 15 Wallace, 232.
Crandall vs. Nevada, 6 Wallace, 35.
County of Mobile vs. Kimball, 102 U. S. 691.

Hall vs. De Cuir, 95 U. S. 485.
Bowman vs. Chicago, etc., Ry. Co., 125 U. S. 465.
Wabash, etc., Ry. Co. vs. Illinois, 118 U. S. 557–572.

It may be well here to observe, though the fact is not controlling, that Congress has acted upon the general subject of the regulation of commerce among the states.

R. S. U. S., Sections 5258 and 4252 to 4289, "An act to Regulate Commerce," approved February 4th, 1887, Sess. Laws, 1887, pages 379 to 387.

These national laws prescribing regulations for the control of Inter-State Commerce would have been held, even by the strict constructionists of our early history, as excluding all State action affecting the subject; and they afford strong reasons for setting aside all such State action. Those engaged in this commerce are subjected to and bound by these national regulations and are therefore the more entitled upon principles of justice and right to exemption from additional burdens attempted to be imposed by state legislation.

Recurring now to the general proposition, that the state cannot establish non-intercourse between her people and those of other states with respect to a known article of commerce, we call attention to the following authorities:

Hinson vs. Lott, 8 Wallace, p. 148.

This case presented a question as to the constitutionality of an act of the legislature of Alabama, requiring the payment of a certain tax on all liquors introduced into the state for sale. The act was held to be unconstitutional upon the ground that it imposed upon non-residents a burden to which the citizens of the state were not subjected, and tending to establish non-intercourse in her commercial relations betweeen Alabama and the other states of the Union. Said the court [p. 150]:

"It is obvious that the right to impose any "such discriminating tax, if it exists at all, cannot "be limited in amount, and that a tax under the "same authority can as readily be laid which "would amount to an absolute prohibition to sell "liquors introduced from without, while the privi- "lege would remain unobstructed in regard to ar- "ticles made in the state. If this can be done in "reference to liquors, it can be done with reference "to all the products of a sister state, *and in this "mode one state can establish a complete system of "non-intercourse in her commercial relations with "all the other states of the Union.*"

And again [p. 151]:

"Nor can it be doubted that a tax which so "seriously affects the interchange of commodities "between the states as to essentially impede or seri- "ously interfere with it, is a regulation of com- "merce."

In this case, and in some others which we shall cite, the state legislation was enacted in the form of a tax law, but it will be conceded that the power to

tax is at least co-extensive with the power to establish police regulations. [See *Kidd vs. Pearson*, closing paragraph of opinion, 128 U. S. p. 26.] And, therefore, these authorities are strictly in point.

Wabash Ry. vs. Illinois, 118 U. S. 573.

In this case the court, in discussing the right of intercourse between the citizens of the different states, said, speaking of the commercial clause of the constitution:

"And it would be a very feeble and almost "useless provision, but poorly adapted to secure the "entire freedom of commerce among the states, "which was deemed essential to a more perfect union "by the framers of the constitution, if, at every "stage of the transportation of goods and chattels "through the country, the state within whose limits "a part of this transportation must be done could "impose regulations concerning the price, compen-"sation, *or taxation, or any other restrictive regula-"tion* interfering with and seriously embarrassing "this commerce."

Walling vs. Michigan, 116 U. S. p. 446.

In the course of the opinion [p. 458] the court quoted with approbation from the decision of the Supreme Court of Missouri in the case of *State vs. North & Scott*, 27 Mo., as follows:

"Can any power more destructive to the union "and harmony of the states be exercised than that "of imposing discriminating taxes or duties on im-"ports from other states? Whatever may be the "motive for such taxes, they cannot fail to beget

"irritation and to lead to retaliation; and it is not "difficult to foresee that an indulgence in such a "course of legislation must inflame and produce a "state of feeling that would seek its gratification in "any measures regardless of the consequences." Citing numerous authorities.

Further on in the same opinion the court, commenting upon numerous state decisions holding an occupation tax to be valid, says [p. 461]:

"None of these cases, however, sustain the doc- "trine that an occupation can be taxed if the tax is "so specialized as to operate as a discriminating "burden against the introduction and sale of the "products of another state, or against the citizens "of another state."

In the case of *Welton vs. Missouri*, 91 U. S. 275, it is held that the exclusive power over interstate commerce, "was vested in Congress to insure "uniformity of commercial regulation against dis- "criminating state legislation." And further, that

"It covers property which is transported as an "article of commerce from foreign countries, or "among the states, from hostile or interfering state "legislation until it has mingled with and become "a part of the general property of the country, "and protects it even after it has entered a state "from any burdens imposed by reason of its foreign "origin."

Webber vs. Virginia, 103 U. S. p. 344.

Here we find the same rule strongly stated in the opinion by Mr. Justice FIELD, as follows [p. 350]:

"If, by reason of their foreign character, the "state can impose a tax upon them, or upon the "person through whom the sales are effected, the "amount of the tax will be a matter resting in her "discretion. She may place the tax at so high a "figure as to *exclude the introduction of the foreign "article and prevent competition with the home "product*. It was against legislation of this *dis-"criminating kind* that the framers of the constitu-"tion intended to guard when they vested in Con-"gress the power to regulate commerce among the "several states."

And again [pp. 350, 351]:

"But where a power is vested exclusively "in that government (federal government), and "its exercise is essential to the perfect freedom "of commercial intercourse between the several "states, any *interfering action by them must give "way*. This was stipulated in the indissoluble "covenant by which we became one people. * * "Commerce among the states in any commodity "can only be free when the commodity is exempted "from *all discriminating regulations* and burdens "imposed by local authority by reason of its foreign "growth or manufacture."

Bowman vs. Railway Company, 125 U. S. p. 465. In the course of the opinion by Mr. Justice MATHEWS, at p. 481, the following language is quoted from the case of the *State Freight Tax*, 15 Wallace:

"It is of national importance that over that "subject there should be but one regulating "power, for if one state can directly tax persons "or property passing through it, or tax them indi-"rectly by levying a tax upon their transportion,

"every other may, and thus commercial intercourse "between states remote from each other may be de- "stroyed. The produce of western states may thus "be effectually excluded from eastern markets, for, "though it might bear the imposition of a single "tax, it would be crushed under a load of many. "It was to guard against the possibility of such "commercial embarrassments, no doubt, that the "power of regulating commerce among the states "was conferred upon the Federal Government."

Enough has been quoted to show beyond question that a state cannot impose any burden upon interstate commerce, nor establish any regulation by way of taxation, the exercise of the police power, or otherwise, against a non-resident. And this doctrine applies with still greater force to a statute, such as the one under consideration, which does not stop with a tax or with a burden imposed upon the non-resident dealer in pure and wholesome dressed meats, but which, as we have already shown, imposes an absolute prohibition upon all such interstate commerce; which in fact raises a barrier which the non-resident cannot pass, and thereby creates an absolute monopoly in the hands of the local cattle raisers and the local butchers, by abolishing all competition between residents and non-residents in this particular trade. It falls, therefore, clearly and unquestionably within the decisions to which we have referred.

III.

The controlling inquiry is, does the article sought to be excluded from the markets of the state belong to commerce?

We are to consider whether the statute of Minnesota was enacted in the proper exercise of the police power which is reserved to the states of the Union, or was it an attempted regulation of interstate commerce. If the former, it may be upheld. If the latter, it is an encroachment upon the exclusive domain of Congress, and is therefore void. Fortunately the rule by which this question is to be determined is no longer left in doubt and uncertainty. It has been settled by this court, which is the final arbiter of all such questions; and the rule is this: If the article sought to be excluded from the state is an article of commerce, or, as the Supreme Court expresses it, if the article "belongs to commerce" it is then beyond the reach of the police power of the state. If it does not belong to commerce because of its condition of putresence, or of its being diseased or dangerous, then it falls within the police power of the state. This point was first decided by this court in the *License Cases*. We quote from the opinion of Mr. Justice CATRON, 5 Howard, pp. 599 and 600–601, and this language is quoted with emphatic approval by this court in the recent case of *Bowman vs. Railway Co.*, 125 U. S. pp. 489 to 491:

"The assumption is, that the police power was "not touched by the constitution, but left to the "states as the constitution found it. This is "admitted; and whenever a thing, from character "or condition, is of a description to be regu- "lated by that power in the state, then the regula- "tion may be made by the state, and Congress can- "not interfere. But this must always depend on "facts, subject to legal ascertainment, so that the "injured may have redress. And the fact must find "its support in this, *whether the prohibited article "belongs to, and is subject to be regulated as part "of foreign commerce, or of commerce among the "states. If, from its nature, it does not belong to "commerce, or if its condition, from putresence or "other cause, is such when it is about to enter the "state that it no longer belongs to commerce, or, in "other words, is not a commercial article*, then the "state power may exclude its introduction. And, "as an incident to this power, a state may use means "to ascertain the fact. And here is the limit be- "tween the sovereign power of the state and the "federal power. That is to say, *that which does not "belong to commerce is within the jurisdiction of "the police power of the state; and that which does "belong to commerce is within the jurisdiction of "the United States.* And to this limit must all the "general views come, as I suppose, that were sug- "gested in the reasoning of this court in the cases "of *Gibbons vs. Ogden*, 9 Wheat. 1; *Brown vs. "The State of Maryland*, 12 Wheat. 419; *New "York vs. Miln*, 11 Pet. 102.

"What, then, is the assumption of the state "court? Undoubtedly, in effect, that the state had "the power to declare what should be an article of "lawful commerce in the particular state; and, hav- "ing declared that ardent spirits and wines were "deleterious to morals and health, they ceased to be

"commercial commodities there, and that then the "police power attached, and consequently the power "of Congress could not interfere. The exclusive state "power is made to rest, *not on the fact of the state "or condition of the article*, nor that it is property "usually passing by sale from hand to hand, but on "the *declaration found in the state laws, and as- "serted as the state policy, that it shall be excluded "from commerce.* And by this means the sovereign "jurisdiction of the state is attempted to be created "in a case where it did not previously exist.

"If this be the true construction of the consti- "tutional provision, then the paramount power of "Congress to regulate commerce is subject to a very "material limitation; for it takes from Congress "and leaves with the states the power *to determine "the commodities, or articles of property, which are "the subjects of lawful commerce.* Congress may "regulate, but the states *determine what shall or "shall not be regulated.*

"Upon this theory, the power to regulate com- "merce, instead of being paramount over the sub- "ject, would become *subordinate to the state police "power;* for it is obvious that the power to deter- "mine the articles which may be the subjects of "commerce, and thus to circumscribe its scope and "operation, is, in effect, the controlling one. The "police power would not only be a formidable "rival, but, in a struggle, must necessarily triumph "over the commercial power, *as the power to regu- "late is dependent upon the power to fix and deter- "mine upon the subjects to be regulated.*

"The same process of legislation and reason- "ing adopted by the state and its courts could bring "within the police power any article of consump- "tion that a state might wish to exclude, whether "it belonged to that which was drunk, or to food "and clothing; and with nearly equal claims to

"propriety, as malt liquors and the produce of "fruits other than grapes, stand on no higher "grounds than the light wines of this and other "countries, excluded, in effect, by the law as it now "stands. And it would be only another step to "regulate real or supposed extravagance in food and "clothing."

The case of *Bowman vs. Railway Co., supra*, involved the constitutionality of an act of the legislature of Iowa forbidding common carriers from bringing intoxicating liquors into the state from another state or territory, without first being furnished with a certificate under the seal of the auditor of the county to which it was to be transported or consigned, certifying that the consignee or person to whom it has been transported or delivered is authorized to sell intoxicating liquors in the county. And it was held that this statute, although adopted with no purpose of affecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and the sale of intoxicating liquors within the state, was neither an inspection law, nor a quarantine law, but was a regulation of commerce among the states affecting interstate commerce in an essential and vital point, and, not being sanctioned by the authority of Congress, expressed or implied, was repugnant to the Constitution of the United States.

The opinion of Mr. Justice MATHEWS is elaborate, clear and exhaustive. He cites all the leading decisions of the Supreme Court arising under the commercial clause of the constitution, and discusses with great clearness and force the nature and extent of the police power of the states. This case will be referred to under other propositions. Upon the point now under consideration, after quoting from and endorsing the opinion of Mr. Justice CATRON as above, as well as from many other similar authorities, the court said [p. 493]:

"The statute of Iowa under consideration falls "within this prohibition. It is not an inspection "law; it is not a quarantine or sanitary law. It is "essentially a regulation of commerce among the "states within any definition heretofore given to "that term, or which can be given; and although its "motive and purpose are to perfect the policy of the "State of Iowa in protecting its citizens against the "evils of intemperence, it is none the less on that "account a regulation of commerce. If it had ex-"tended its provisions so as to prohibit the intro-"duction into the state from foreign countries of all "importations of intoxicating liquors produced "abroad, no one would doubt the nature of the "provision as a regulation of foreign commerce. "Its nature is not changed by its application to "commerce among the states."

Railroad Co. vs. Husen, 95 U. S. 465.

This decision is directly in point upon the most of the questions arising in the present case. It involved the question of the constitutionality of the act of the legislature of Missouri prohibiting the

introduction into that state during certain months of the year, of all Texas, Mexican and Indian cattle. The purpose of the act was to protect the people of Missouri against the introduction of a disease known as Texas fever, which was communicated by Texas cattle and which could not be discovered upon an inspection of such cattle; hence the enactment of a law excluding all such cattle. The statute was defended as a lawful exercise of the police power of the state, and was attacked as a regulation of interstate commerce. The whole opinion is in point in the present case and very important. The act was held unconstitutional because it was not limited in its operation to the exclusion of cattle affected with the disease known as Texas fever, but was broad enough in its provisions to apply to sound and healthy cattle; therefore broad enough to interfere with honest and legitimate commerce between Missouri and Texas. The closing paragraph of the opinion is as follows:

"The police power of a state cannot obstruct "foreign commerce or interstate commerce beyond "the necessity for its excercise; and under color of "it objects not within its scope cannot be secured at "the expense of the protection afforded by the fed- "eral constitution. And as its range sometimes "comes very near to the field committed by the "constitution to Congress, it is the duty of the "courts to guard vigilantly against any needless in- "trusion."

An examination of these authorities will clearly show: *first*, that if the article in question is an article of commerce, or belongs to commerce, it is not within the police power of the state; and *second*, that whether the article in question belongs to commerce, or is an article of commerce, depends not upon the declaration of any legislature but upon its actual character or condition. The states may, as this court declares, provide by law against the introduction into the state of articles diseased, contagious, infectious or otherwise dangerous to the public. And to this end they may prevent the importation of "articles of "trade, which, on account of *their existing condi-"tion*, would bring in and spread disease, pestilence "and death, such as rags or other substances infected "with the the germs of yellow fever or the virus of "small pox, or cattle, or meat or other provisions "that are diseased or decayed, or otherwise, *from "their condition and quality*, unfit for human use or "consumption." And the reason why this may be done is that "such articles are not merchantable; "they are not legitimate subjects of trade and com-"merce. They may be rightly outlawed as *intrin-"sically* and *directly* the immediate sources and "causes of destruction to human health and life." [See 125 U. S. p. 489].

And again, "if, from its nature, it does not be-"long to commerce or if *its condition, from putres-"ence or other cause, is such, when it is about to "enter the state*, that it no longer belongs to com-

"merce, or, in other words, is not a commercial "article, then the state power may exclude its intro- "duction." [125 U. S. 490.] In other words, in order to exclude from commerce and from the protection of the commercial clause of the Federal Constitution, an article which ordinarily belongs to commerce it is necessary that it shall appear *affirmatively* that the article is in such *actual condition* as to be dangerous to the health, or destructive of the peace and comfort of the people. No argument is needed to show that sound and wholesome dressed beef, pork or mutton, is a commercial article, or to use the phrase of the Supreme Court "belongs to commerce." The court will take judicial notice of this fact. It is common knowledge that, since the invention of refrigerator cars, the packing and shipping of dressed meats from state to state has become an extensive branch of commerce. It is admitted upon the record that the present case grew out of this commerce. It is for the court and not for the legislature to determine what is an article of commerce.

Says Mr. Justice FIELD in his concurring opinion in the Bowman case [125 U. S. 501]:

"What is an article of commerce is determinable "by the usages of the commercial world, *and does not "depend upon the declaration of any state.* The state "possesses the power to prescribe all such regulations "with respect to the possession, use and sale of "property within its limits as may be necessary to "protect the health, lives, and morals of its people; "and that power may be applied to all kinds of

"property, even that which in its nature is harmless. "But the power of regulation for that purpose is "one thing, and the power to *exclude an article "from commerce by a declaration that it shall not "thenceforth be the subject of use and sale, is another "and very different thing.* If the state could thus "take an article from commerce, its power over "interstate commerce would be superior to that of "Congress, where the constitution has vested it."

IV.

The state legislature cannot determine the question: what is an article of commerce, so as to fall within the commercial power of Congress?

Most of the foregoing authorities are in point under this head. We rely especially upon the opinion of Mr. Justice CATRON in the *License Cases* from which we have already quoted. By referring thereto it will be seen that the court first decides that the police power of a state cannot act upon any legitimate subject of interstate commerce. The court then proceeds to the consideration of the point we are now considering, and says:

"What, then, is the assumption of the state court? "Undoubtedly in effect, that the state *had the power "to declare what should be an article of lawful com- "merce in the particular state.* * * * The exclu- "sive state power is made to rest, not on the fact of "the state or condition of the article, nor that it is "property usually passing by sale from hand to hand, "but on *the declaration found in the state laws*, and "asserted as the state policy, that it shall be excluded

"from commerce. And by this means the sover-"eign jurisdiction in the state is attempted to be "created, in a case where it did not previously ex-"ist."

And it was therefore distinctly decided that the declaration by the state legislature, that a particular article shall be excluded from commerce, does not settle the question. [5 Howard, pp. 600 and 601.]

This ruling is not only final as an authority, but it is also conclusive as an argument. It is clear as demonstration, that if the state can determine what articles of trade or commerce shall fall within, and what shall fall without, the regulating power of Congress, then the state may practically nullify the commercial clause of the Federal Constitution; and this country may be carried back to the condition in which the colonies found themselves prior to the constitution, when each separate legislature was engaged in an effort to gain for its own constituents advantages in trade over non-residents.

The language from which we have quoted in the *License Cases* was quoted with emphatic approval by this court in the Bowman case, and the point which we are now considering was there fully considered and finally decided.

Conceding that the state may exclude animals which are actually affected with contagious or infectious diseases, the court nevertheless declares:

"But whatever may be the nature and reach of "the police power of the state, it cannot be exercised "over a subject confided exclusively to Congress by "the Federal Constitution. It cannot invade the "domain of the national government. * * Neither "the unlimited power of a state to tax, nor any of "its large police powers, can be exercised to such "an extent as to work a practical assumption "of the powers properly conferred upon Congress "by the constitution." [125 U. S. 492, 493.]

And upon exactly the same point now under consideration, the court said:

"Can it be supposed that by admitting any "express declarations on the subject, Congress "has intended to submit to the several states "*the decision of the question in each locality of* "*what shall and what shall not be articles of* "*traffic in the interstate commerce of the country?* "If so, it is left to each state according to its "own caprice and arbitrary will, to discriminate "for or against every article grown, produced, man- "ufactured or sold in any state and sought to be "introduced as an article of commerce into any "other." [125 U. S. pp. 493, 494.]

The argument that the state is the final judge as to what persons or property it will admit into its territory, and what it will exclude, is not new. It has in substance frequently been urged in this court and always overruled. This will be made apparent by the authorities which will be cited under the next point.

V.

The state cannot stop all commerce in sound and wholesome fresh dressed meats under a claim, asserted by its legislature, that this is necessary in order to protect the people against that which may be unsound and unwholesome. In other words, the state, in the exercise of its police power, is bound to discriminate between that which is sound and wholesome and that which is diseased and dangerous.

The claim will be made that it is impossible to determine by an inspection of dressed beef whether the animal from which it was taken was diseased or not, and that, inasmuch as some of the dressed meat shipped into the state from other states may have been taken from diseased animals, the state may declare it necessary to exclude all such dressed meat from its markets. As already suggested, this argument has in substance frequently been presented to, and considered by this court, and always overruled.

Henderson vs. The Mayor of New York, 92 U. S. 259, is strongly in point. That case presented the question of the constitutionality of a statute of New York, enacted for the purpose of protecting the people of that state against the introduction of foreign paupers, criminals and vagabonds. As a means to this end, all foreigners landing in New York were required to give indemnity against becoming a public charge. The learned counsel for the City of New York, in supporting this statute in his argument, said:

"There is no practical mode in which the state "can correctly decide which of these alien strangers "is self-supporting. *Hence it may rightfully exact "indemnity from all.*" [92 U. S. p. 264.]

But this argument was overruled by the court, which said [p. 271]:

"This power, frequently referred to in the de- "cisions of this court, has been, in general terms, "somewhat loosely called the police power. It is "not necessary for the course of this discussion to "attempt to define it more accurately than it has "been defined already. It is not necessary, because "*whatever may be the nature and extent of that "power, where not otherwise restricted, no definition "of it, and no urgency for its use, can authorize a "state to exercise it in regard to a subject matter, "which has been confined exclusively to the discre- "tion of Congress by the constitution.*"

The same argument was made in the *Passenger Cases*, and was answered by the opinion of Mr. Justice WAYNE, as follows [7 Howard, p. 425]:

"The states have also reserved the police "right to turn off from their territories paupers, "vagabonds and fugitives from justice. But they "have not reserved the use of taxation universally "as the means to accomplish that object, as they "had it before they became the United States. "Having surrendered to the United States the sov- "ereign police power over commerce, to be exercised "by Congress or the treaty-making power, it is nec- "essarily a part of the power of the United States "*to determine who shall come to and reside in the "United States for the purpose of trade, independ- "ently of every other condition of admittance "which the states may attempt to impose upon such "persons.*"

And again:

"But it was assumed that a state has unlimited "discretion, in virtue of its unsurrendered police "power, *to determine what persons shall reside in it.* "Then it was said to follow, that the state can re- "move all persons who are thought dangerous "to its welfare; and to this right to remove, it was "said, the right to determine who shall enter the "the state is an inseparable incident. That *erro- "neous proposition of the state's discretion in this "matter* has led to all the more mistaken inferences "made from it." [P. 427.]

The same argument was again answered in the same case by Mr. Justice GRIER [7 Howard, 463]:

"The argument of those who challenge the right "to exercise this power for the states of Massachu- "setts and New York, on the ground that it is a "necessary appurtenant to the police power, seems "fallacious, also in this respect. It assumes that, be- "cause a state, in the exercise of her acknowledged "right, may exclude paupers, lunatics, etc., there- "fore she may exclude all persons, whether they "come within this category or not. *But she "may exclude putrid and pestilential goods from "being landed on her shores; yet, it does not follow "that she may prescribe what sound goods may be "landed, or prohibit their importation altogether.* "The powers used for self-defense and protection "against harm cannot be *perverted into weapons of "offense and aggression upon the rights of others.*"

The case of *R. R. Co. vs. Husen*, 95 U. S. 465, already cited, is exactly in point, and we submit is entirely conclusive of this question. There the legislature of Missouri asserted the fact to be that it was necessary, in order to exclude cattle from

Texas affected with the disease known as Texas fever, to prohibit the introduction of all Texas cattle during certain months of each year. The statute was defended upon the ground that it was impossible by any inspection of Texas cattle to determine the presence of that particular disease; hence the right was asserted to excluede all Texas cattle. The analogy between that case and this is apparent. The argument here is precisely the same argument which was pressed, and which was overruled, in that case. It is said to be necessary, in order to exclude diseased meats from other states, that all meats, whether diseased or not, shall be excluded. No discrimination, therefore, is made between that which is sound and wholesome and that which is diseased. The statute of Missouri, considered in the Husen case, was held unconstitutional upon the distinct ground that it encroached upon the exclusive domain of Congress. The whole opinion is in point, but we quote a few passages:

"While we unhesitatingly admit that a state "may pass sanitary laws, and laws for the protection "of life, liberty, health or property within its bor- "ders; while it may prevent persons or animals suf- "fering under contagious or infectious diseases, or "convicts, etc., from entering the state; while for the "purpose of self-protection, it may establish quar- "antine and reasonable inspection laws, it may not "interfere with transportation into or through the "state beyond what is absolutely necessary for its "self-protection. *It may not, under the cover of ex- "erting its police powers, substantially prohibit or "burden either foreign or interstate commerce.*"

And, again, the court says:

"The reach of the statute was far beyond its "professed object, and far into the realm which is "within the exclusive jurisdiction of Congress." [95 U. S. 472.]

Again, on page 473, the court says:

"Tried by this rule, the statute of Missouri is a "plain intrusion upon the exclusive domain of Con- "gress. It is not a quarantine law. It is not an "inspection law. It says to all natural persons and "to all transportation companies: 'You shall not " 'bring into the state any Texas cattle or any Mexi- "'can cattle or Indian cattle between March 1 and "'December 1, in any year, *no matter whether they* "'*are free from disease or not, no matter whether they* "'*may do an injury to the inhabitants of the state or* "'*not;* and if you do bring them in, even for the "'purpose of carrying them through the state with- "'out unloading them, you shall be subject to ex- "traordinary liabilities.' Such a statute, we do not "doubt, it is beyond the power of a state to enact. "To hold otherwise would be to ignore one of the "leading objects which the Constitution of the "United States was designed to secure."

In referring to certain decisions in Illinois upholding the constitutionality of similar legislation, the court said:

"Regarding the statutes as mere police regula- "tions, intended to protect domestic cattle against "infectious disease, those courts have *refused to in- "quire whether the prohibition did not extend beyond "the danger to be apprehended, and whether, there- "fore, the statutes were not something more than ex- "ertions of police power.* That inquiry, they have "said, *was for the legislature and not for the courts.* "*With this we cannot concur.* The police power

"of a state cannot obstruct foreign commerce or in-"terstate commerce beyond the necessity for its ex-"ercise; and *under the color of it, objects not within its "scope cannot be secured at the expense of the pro-"tection afforded by the Federal Constitution.* [pp. 473 and 474.]

And in the case of *Kimmish vs. Ball*, 129 U. S. 217, the decision in the Husen case is reviewed and reaffirmed, the court saying [p. 221]:

"The decision in that case rested upon the "ground *that no discrimination was made by the "law of Missouri in the transportation forbidden "between sound cattle and diseased cattle; and "this circumstance is prominently put forth in "the opinion.*"

Counsel may have the temerity to say that the necessity for the exclusion of all fresh dressed beef outside the state is great, because of the danger to the health of the people to be apprehended from its introduction. In other words, they may claim that the urgency for the enactment of the statute in question will justify the manifest encroachment upon the domain of the commercial power of Congress.

If this argument is made, our answer to it in the first place is, that no such danger exists, and that the purpose of the act, ascertained by its provisions, viewed in the light of facts known to all, was not in good faith to protect the health of the people but was in fact to keep out competition in this article of commerce, and build up a local business in the interest of resident cattle growers and butchers by excluding dressed beef from other

states. This is seen in the fact well known, and of which the court will take judicial notice, that the health of the people has never been endangered or threatened by the introduction in refrigerator cars, from other states, of unwholesome meats. It is apparent that the act is aimed exclusively against non-resident dealers in dressed meats, and that it never would have been passed simply and solely in the interest of public health. But it is not necessary to pursue this argument; for, even if the danger were admitted, it would not confer upon the legislature of the state any authority to interfere with interstate commerce in pure and wholesome dressed meats.

In *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S. 661, the Supreme Court said:

"Definitions of the police power must, however, "be taken, subject to the condition that the state "cannot, in its exercise, *for any purpose whatever*, "encroach upon the powers of the general govern- "ment, or rights granted or secured by the supreme "law of the land."

And, again, in *Henderson, etc., vs. Mayor of New York*, 92 U. S. 259, the court, speaking by Mr. Justice MILLER, while declining to decide whether in the absence of action by Congress "the "states can, or how far they can, by appropriate "legislation, protect themselves against *actual* pau- "pers, vagrants, criminals and diseased persons "arriving in their territory from foreign countries," declare that:

"Whatever may be the nature and extent of "that power (police power), where not otherwise re- "stricted, no definition of it *and no urgency for its* "*use* can authorize a state to exercise it in regard to "a subject matter which has been confided exclus- "ively to the discretion of Congress by the constitu- "tion."

See also *Chy Lung vs. Freeman et al.*, 92 U. S. 275. From the syallabus in this last case we quote:

"And this mere police regulation cannot ex- "tend so far as to prevent or obstruct other classes "of persons from the right to hold personal and "commercial intercourse with the people of the "United States."

While, therefore, we deny most emphatically that any necessity for the statute in question exists, and insist that it was not passed in the interest of the public health, we at the same time confidently assert that, even conceding all that is claimed in this respect, it would not render the statute constitutional, because it attempts to deal with a subject matter beyond the control of the state legislature; and no definition of the police power and no *urgency for its use* can authorize such legislation.

VI.

The state cannot permit the importation and forbid the sale of an article of commerce which is not, in fact, dangerous to the health, morals or comfort of the community.

It will be argued that, while the state cannot interfere with the importation of sound and whole-

some dressed meats from other states, it may, if it chooses to do so, forbid the sale of all such meats after they have entered its territory. This contention is based upon a misapprehension of the force and effect of certain decisions of this court sustaining the validity of prohibitory liquor laws enacted by certain states. An examination of these decisions will show that they are based entirely upon a recognition of the fact that intoxicating liquors are in their nature intrinsically dangerous to the peace, health and morals, of a community, and that they are therefore, and have been from time immemorial, held to be within the police power. In the exercise of that power the states may regulate or control the mode and manner of dealing in intoxicating drinks, or may prohibit the traffic altogether. But it does not follow that, because the state may prohibit all traffic in intoxicating liquors within her borders, *she may also prohibit all traffic in bread and meat, in sugar, in salt, in tea, in coffee, or in any article recognized by the common consent of mankind as a proper subject of trade and commerce or as a necessary and wholesome article of food.*

No lawyer will claim that a law prohibiting the sale of any one of these articles would be constitutional. The grounds upon which prohibitory liquor laws are upheld are stated in *Mugler vs. Kansas*, 123 U. S. 623. On page 662 the court said:

"There is no justification for holding that the "state, under the guise merely of police regula-

"tions, is here aiming to deprive the citizen of his "constitutional rights; for we cannot shut out of "view the fact, within the knowledge of all, that "the public health, the public morals, and the pub-"lic safety, may be endangered by the general use "of intoxicating drinks; nor the fact, established "by statistics accessible to every one, that the idle-"ness, disorder, pauperism and crime existing in "the country are, in some degree, at least traceable "to this evil. If, therefore, a state deems the abso-"lute prohibition of the manufacture and sale within "her limits of intoxicating liquors for other than "medical, scientific and manufacturing purposes, to "be necessary to the peace and security of society, "the courts cannot, without usurping legislative "functions, override the will of the people as thus "expressed by their chosen representatives"

And in the same opinion, page 663, the court was careful to say:

"Undoubtedly the state, when providing by "legislation for the protection of the public health, "the public morals or the public safety, is subject "to the paramount authority of the Constitution of "the United States, and may not violate rights se-"cured or guaranteed by that instrument, or inter-"fere with the execution of the powers confided to "the general government," citing numerous cases.

In the case of *Kidd vs. Pearson*, 128 U. S. p. 1, another case involving the constitutionality of certain prohibitory legislation, the court said [p. 18]:

"The proposition that, supposing the goods "were once lawfully called into existence, it would

"then be beyond the power of the state either to "forbid or impede their exportation, may be con- "ceded. Here, however, the very question under- "lying the case is whether the goods ever came law- "fully into existence."

And again, page 22, the court said:

"We find no provisions in any of the sections "of the statute under consideration, the object and "purpose of which are to exert the jurisdiction of "the state over persons or property or transactions "within the limits of other states; or to act upon in- "toxicating liquors as exports, or while they are in "process of exportation or importation."

And on pages 25 and 26, in order to make it clear that the decision shall not be quoted as favoring the right of the state to interfere with interstate commerce, the court quoted with approbation from the case of Daniel Ball, 10 Wall. 557, 565 as follows:

"Whenever a commodity has begun to move as "an article of trade from one state to another, com- "merce in that commodity between the states has "commenced. But this movement does not begin "until the articles have been shipped or started for "transportation from the one state to the other."

We shall show in another connection that the right to sell is one of the privileges and immunities of citizenship which are protected both by the federal and state constitutions. It is sufficient under this head to say that the privilege of importing sound and wholesome dressed meat into the State of Minnesota, without the privilege of selling the same, would be a mockery and a sham.

But another consideration is conclusive of this question. The prohibitory liquor laws are held valid, only where they are made applicable alike to residents and non-residents, and they are, as we have already shown, always held void if they attempt to impose different conditions or restrictions upon non-residents from those which are imposed upon citizens of the state. The act we are considering therefore could not be upheld under the decisions in the liquor cases, for the reason that *it does not apply the same restrictions to residents and non-residents.* Whenever the legislature of Minnesota shall undertake to prohibit all traffic in fresh dressed meats, the question whether its action can be sustained by the decisions in the liquor cases will properly arise, and not before.

Again, it is well settled that the protection afforded to the owner of property brought into one state from another state for sale does not cease when the property reaches it destination, but continues so long as any burden or discrimination is attempted to be imposed upon such property by reason of its foreign origin.

This rule has never been more clearly or forcibly stated than by Mr. Justice FIELD in delivering the unanimous opinion of this court in *Welton vs. State of Missouri*, 91 U. S. at page 282, as follows:

"It is sufficient to hold now that the commer-
"cial power continues *until the commodity has*
"*ceased to be the subject of discriminating legisla-*

"tion by reason of its foreign character. That "power protects it, even after it has entered the state, "from any burdens imposed by reason of its for- "eign origin."

Having thus shown that sound and wholesome articles of food, and known and recognized articles of commerce, do not fall within the doctrine established by the decisions upholding prohibitory liquor laws, we assert further that with respect to all ordinary legitimate articles of commerce the right to sell follows necessarily from the right to import. This doctrine has never been more clearly or forcibly stated than by Chief Justice MARSHALL, in the case of *Brown vs. Maryland*, 12 Wheat. 446, 447, as follows:

"If this power reaches the interior of the state, "and may be there exercised, it must be capable of "authorizing the sale of those articles which it in- "troduces. Commerce is intercourse; one of its "most ordinary ingredients is traffic. It is uncon- "ceivable that the power to authorize this traffic, "when given in the most comprehensive terms, with "the intent that its efficacy should be complete, "should cease at the point when its continuance is "indispensible to its value. To what purpose "should the power to allow importation be given, "unaccompanied with the power to authorize a sale "of the thing imported? Sale is the object of im- "portation, and is an essential ingredient of that in- "tercourse of which importation constitutes a part. "It is as essential an ingredient, as indispensible to "the existence of the entire thing, then, as importa- "tion itself. It must be considered as a component "part of the power to regulate commerce. Con- "gress has the right, not only to authorize importa- "tion, but to authorize the importer to sell."

VII.

The act in question is in violation of Article 4, Section 2, of the Constitution of the United States, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It is also in violation of that provision of the Fourteenth Amendment of the Constitution of the United States, which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

These several constitutional provisions are aimed at the protection of the citizen in the enjoyment of all such rights and privileges as belong to citizenship. We maintain, with the greatest confidence, that among the immunities guaranteed by these provisions is the right to acquire, possess and dispose of, property, meaning by property everything which is the subject of trade and commerce and which is not intrinsically injurious or dangerous to the health, peace, comforts or morals, of the community. And hence we maintain, under this head, that the act in question is unconstitutional, because in respect to the right of disposing of property it discriminates against non-residents of Minnesota and in favor of residents. It is well settled by the decisions of the Supreme Court of United States, that any statute which imposes any discriminating tax or burden upon non-residents transact-

ing business within such state is unconstiutional and void.

Hinson vs. Lot, 8 Wall. 148.
Ward vs. Maryland, 12 Wall. 118.
Walling vs. Michigan, 116 U. S. 446.
Welton vs. Missouri, 91 U. S. 279.
Weber vs. Virginia, 103 U. S. 344.

An examination of these and other cases will show that the act in question is in violation, not only of the commercial clause of the constitution, but of the various other provisions which we are now considering, and which were adopted for the protection of the rights, privileges and immunities of citizens of the United States and of the several states. Without quoting at large the above cited authorities, we make the following extracts, which will show that the discrimination against non-residents, attempted to be established by the statute in question, is unconstitutional and void upon both of the grounds here stated.

In *Walling vs. Michigan*, *supra*, at page 459, the court said:

"It is suggested by the learned judge who de-
"delivered the opinion of the Supreme Court of
"Michigan in this case, that the tax imposed by the
"act of 1875, is an exercise by the legislature of
"Michigan of the police power of the state for the
"discouragement of the use of intoxicating liquors,
"and the preservation of the health and morals of
"the people. *This would be a perfect justification of*
"the act if it did not discriminate against the citi-
"zens and products of other states in a matter of

"*commerce between the states, and thus usurp one of* "*the prerogatives of the national legislature.* The "police power cannot be set up to control the "inhibitions of the Federal Constitution, or the "powers of the United States government created "thereby."

In *Weber vs. Virginia*, 103 U. S., at page 351, the court said:

"Commerce among the states in any commodity "can only be free when the commodity is exempted "from all discriminating regulations and burdens "imposed by local authority by reason of its foreign "growth or manufacture."

We furthermore submit, with great confidence, that the right to sell within the State of Minnesota any article of commerce brought there from another state is a privilege and immunity of citizenship which cannot be taken away by state legislation. While it is true that the Supreme Court of the United States has always declined to make an enumeration of all the privileges and immunities which are protected by the terms of the Federal constitution, enough has been decided to make clear the proposition that the right to acquire, possess and dispose of, property is one of those privileges and immunities. Indeed, this was among the fundamental principles of the common law and the British constitution which our forefathers had in mind when the constitution was adopted.

BLACKSTONE says:

"The third absolute right inherent in every "Englishman is that of property; which consists in

"the free use, enjoyment *and disposal of all his* "*acquisitions* without any control or diminution, "save only by the laws of the land." Bl. Com., Book 1, Chap. I. p. 138.

Chancellor KENT says:

"The power of *alienation of property* is a "necessary incident to the right of property, and "was dictated by mutual convenience and mutual "wants."

Kent's Commentaries, Vol. II, page 327.

And, again, in referring to certain restrictions upon the right to alienate real estate formerly existing in England, the chancellor says:

"All those embarrassments have been effect- "ually removed in this country; and the right to "acquire, to hold, to enjoy, *to alien*, to devise and "to transmit property by inheritance to one's de- "scendants in regular order and succession, is "enjoyed *in the fullness and perfection of absolute* "*right*."

Kent's Commentaries, Vol. II. page 329.

In the case of *Corfield vs. Coryell*, 4 Washington C. C. 381, will be found an enumeration of some of the privileges and immunities protected by the Constitution of the United States, and among them the following:

"The right of a citizen of one state to pass "through, or to reside in any other state, *for pur-* "*pose of trade*, agricultural, professional pursuits, "or otherwise; to claim the benefit of the writ of "habeas corpus; to institute and maintain actions "of any kind in the courts of the state; *to take*, "*hold and dispose of property, either real or personal*,

"and an exemption from higher taxes or imposi-"tions than are paid by the other citizens of the "state, may be mentioned as some of the particular "privileges and immunities of citizens, which are "*clearly* embraced by the general description of "privileges deemed to be fundamental."

The case of *Ward vs. Maryland*, 12 Wall. 118, already cited and commented upon, is to the same effect. The opinion of Judge WASHINGTON, in *Corfield vs. Coryell*, *supra*, was quoted with approbation by the Supreme Court of the United States in the *Slaughter House Cases*, 16 Wall. 75, 76. Thus it has become a recognized and leading authority upon the question now under consideration. The definition of privileges and immunities in that opinion, says Mr. Justice MILLER in the *Slaughter House Cases*, "was adopted in the main by "this court in the recent case of *Ward vs. State of "Maryland*."

In the case of *Paul vs. Virginia*, 8 Wall. 180, quoted and approved in the *Slaughter House Cases*, 16 Wall. 76, the court said:

"The privileges and immunities secured to cit-"izens of each state in the several states, by the pro-"vision in question, are those privileges and immu-"nities which are common to the citizens in the lat-"ter states under their constitutions and laws by "virtue of their being citizens."

And Mr. Justice MILLER declares, in his great opinion in the *Slaughter House Cases* [p. 77]:

"Its sole purpose was to declare to the several "states that whatever those rights, as you grant or "establish them to your own citizens, or as you

"limit or qualify, or impose restrictions on their "exercise, the same, neither more nor less, shall be "the measure of the rights of citizens of other "states within your jurisdiction."

It is important here to note that there was in the articles of the old confederation a clause destined to protect the privileges and immunities of the citizens of the several colonies. The language of that provision was:

"That the better to secure and perpetuate *mu-*"*tual friendship and intercourse* among the people "of the different states in this Union, the free in-"habitants of each of these states, paupers, vaga-"bonds and fugitives from justice excepted, shall be "entitled to all the privileges and immunities of "free citizens in the several states; and the people "of each state shall have free ingress and egress to "and from any other state, and shall enjoy therein "*all the privileges of trade and commerce, subject to* "*the same duties, impositions and restrictions as the* "*inhabitants thereof respectively.*" [See 16 Wall. 75.]

Commenting on this clause of the Articles of Confederation, and upon section 2 of the fourth article of the constitution, Mr. Justice MILLER, in the *Slaughter House Cases*, says:

"There can be but little question that the pur-"pose of both these provisions is the same, and that "the privileges and immunities intended are the "same in each. In the Article of the Confedera-"tion we have some of these specifically mentioned, "and enough perhaps to give some general idea of "the class of civil rights meant by the phrase."

Among the privileges specifically mentioned in the Articles of Confederation was the right to "all

"the privileges of trade and commerce," etc., so that we have here a distinct declaration that this was one of the privileges intended to be protected by the Federal Constitution.

Judge COOLEY, in his work on Constitutional Limitations, 5 Ed., p. 602 says:

"It is also believed that that provision in the "Constitution of the United States which declares, "'that the citizens of each state shall be entitled to "'all the privileges and immunities of the citizens "'of the several states,' will preclude any state from "imposing upon the property which citizens of "other states may own, or the business which they "may carry on within its limits, any higher burdens "by way of taxation than are imposed upon corres- "ponding property or business of its own citizens."

See also to the same purport, *Lemmon vs. People*, 20 New York, 608.

In the case of *Barbier vs. Conolly*, 113 U. S. at page 31, the Supreme Court, construing the Fourteenth Amendment, declares that it was

"Undoubtedly intended not only that there "should be no arbitrary deprivation of life or lib- "erty, or arbitrary spoliation of property, but that "equal protection should be given to all under like "circumstances in the enjoyment of their personal "and civil rights; that all persons should be equally "entitled to pursue their happiness and *acquire "and enjoy property;* that they should have like "access to the courts of the country for the protec- tion of their persons and property, the prevention "and redress of wrongs, and the enforcement of "contracts; that *no impediment should be interposed "to the pursuits of anyone except as applied to the*

"*same pursuits by others under like circumstances;*
"*that no greater burdens should be laid upon one*
"*than are laid upon others in the same calling and*
"*condition*, and that in the administration of crim-
"inal justice no different and higher punishments
"should be imposed upon one than such as is pre-
"scribed to all for like offenses."

Applying these principles to the statute under consideration, it is only necessary to call attention to the fact that the statute presents a case of discrimination against non-residents as gross as any that could be imagined, since, as we have already stated, it imposes upon non-residents an oppressive condition precedent to their engaging in the sale within the state of fresh dressed meats, however sound and wholesome, while as to the citizens of Minnesota it imposes a condition easily complied with by them. Since the statute requires of all non-resident dealers in fresh dressed meats an impossible condition precedent to their bringing in their property for sale, it is a plain attempt to deprive these citizens of one of the privileges and immunities guaranteed by the Constitution of the United States.

Respectfully submitted.

GEO. W. McCRARY.
WALLACE PRATT.
Of Counsel for Appellee.

Supreme Court of the United States.

In the Matter of the Application of Henry E. Barbour for a Writ of Habeas Corpus.

THE STATE OF MINNESOTA,
APPELLANT,
vs.
HENRY E. BARBOUR,
RESPONDENT.

No. 1346.

BRIEF AND ARGUMENT FOR APPELLANT.

By JAS. O. BROADHEAD,
for Appellant.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

Supreme Court of the United States.

In the matter of the application of Henry E. Barbour for a writ of Habeas Corpus.

THE STATE OF MINNESOTA, APPELLANT,
v.
HENRY E. BARBOUR, RESPONDENT.
No. 1,346.

Brief and Argument for Appellant.

I. The first and main question in this case is, whether the act of the legislature of Minnesota is, upon its face and by a fair construction of its provisions, a police regulation.

The case is an appeal by the State of Minnesota from the judgment of the Circuit Court of the United States for the district of Minnesota, discharging the respondent from imprisonment under a conviction by a competent court of that State, for a violation of its inspection laws—chapter 8 of the Session Laws of 1889—entitled:

"*An act for the protection of the public health by providing for inspection before slaughter of cattle, sheep, and swine designed for slaughter for human food.*

"Approved April 16, 1889."

The law is objected to as unconstitutional, mainly upon the ground that it violates Section 2, Article IV, of the United States Constitution, which declares that "Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

The act in question is set out in full in the brief of Mr. Govern E. Cole, attorney for the State of Minnesota, to which reference is made.

By the first section the sale of any fresh beef, veal, mutton, lamb, or pork, for human food is prohibited except as thereinafter provided, which means, of course, unless the beef, veal, mutton, lamb, or pork has been taken from an animal which had been inspected before it was slaughtered.

The 2d section of the act provides as follows:

"SEC. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs, and townships within this State, to appoint one or more inspectors of cattle, sheep, and swine for said city, village, borough, or township, who shall hold their offices for one year, and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially co-extensive with the board so appointing them; and said several boards shall regulate the form of certificate to be issued by such inspectors and the fees to be paid them by the person applying for such inspection, which fees shall be no greater than are actually necessary to defray the costs of the inspection provided for in section three (3) of this act."

Section 3 defines the duties of inspectors, and declares that the inspection shall be had within twenty-four hours before the animal is slaughtered, and if found healthy and in a suitable condition to be slaughtered for human food, the inspector is required to give a certificate to that effect. And section 4 provides as follows:

"SEC. 4. Any person who shall sell, expose, or offer for

sale for human food in this State any fresh beef, veal, mutton, lamb, or pork whatsoever, which has not been taken from an animal inspected and certified before slaughter, by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars, or by imprisonment not exceeding three months for each offence."

It was under this section that the respondent, a citizen of Illinois, was arrested, tried, and convicted for offering for sale in Minnesota beef taken from an animal slaughtered in Illinois, but not inspected.

Are these provisions of the Minnesota law, police regulations? Because if they are police regulations, made by the State of Minnesota as a means of preserving the health of the inhabitants of that State and nothing more, then they cannot be impeached or invalidated by *any provision* of the Constitution of the United States; because the police power is a power of government never surrendered to the Federal Government, but reserved to the State governments for the preservation of the health and morals of its own citizens.

If not surrendered to the Federal Government it follows as a logical *sequitur* that no power given to Congress can interfere with it.

It would be a solecism to say that a power not surrendered, but reserved, when the Constitution was framed, could be impaired or destroyed by any provision contained in that instrument.

The decisions of this Court are authoritative and uniform upon the proposition that—

"The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, has never been surrendered by the States, or restrained by the Constitution of the United States." (Moore *v.* Illinois, 14 Howard, p. 13.)

This is the language of Justice Greer, and it is sustained in a number of other cases hereafter referred to.

Then, if the act of the Minnesota legislature is a police regulation for the preservation of the health of the inhabitants of that State, the question before this Court in this case is settled.

The title of the act, according to acknowledged rules of interpretation, must have an influence in determining its object. It is supposed to express the intention of the legislature, and unless there is something in the body of the act palpably inconsistent with it, then it ought to have a controlling influence in determining the legislative intent.

It is entitled—

"An Act for the protection of the public health, by providing for inspection, before slaughter, of cattle, sheep, and swine, designed for slaughter for human flood."

Here the object of the act is clearly stated in the preamble.

But the act further provides that the *Boards of Health* of the different municipalities shall appoint inspectors; and thus the persons having control and superintendence of the public health are to put the machinery of the act in operation by appointing the inspectors.

Is there any such thing known as disease in animals, before they are slaughtered, whose flesh is to be used for human food? I assume that the Court will take judicial notice of the fact that pleuro-pneumonia, Texas fever, and other diseases do exist, and have existed in such animals—the history of the country proves it—the decisions of the courts and the acts of Congress and of the State legislatures show it to be true. The act of Congress on the subject of pleuro-pneumonia provides that the animal shall be examined—inspected—and if found diseased may be killed.

This to prevent the spread of the disease; and whatever may be said about the validity of some portions of that act, the passage of the act itself is based upon the idea that the disease may be detected by an inspection of the animal while alive.

But who does not know that when the vital parts of an animal whose disease causes death or unhealthiness, such as the heart, the lungs, the kidneys, the liver—the bowels are taken out—that it is next to impossible from an examination of the muscles, or whatever else may remain of the carcass, to discover whether disease existed or not? Whereas, when the animal is living, the symptoms of disease will exhibit themselves in various forms.

If this be so, then live inspection becomes a legitimate subject of legislation, based upon the idea that the fresh meat of such animals, which is intended to be sold for human food, may become deleterious to the public health. It is urged on the other side that a part of the meat not subjected to live inspection is sound, or that all of it is sound, not affected with disease; but who knows whether it is sound or not, or how much of it is sound? The answer is, inspect the meat after the animal is killed and before it is put upon the market.

If this power be admitted, then it is admitted that the State may adopt some method of ascertaining the fact of soundness or unsoundness; the State chooses to adopt the method of live-stock inspection as the best means of ascertaining the fact. Will the Court say that the State shall not adopt this method, but must adopt some other? In other words, the State is not at liberty to exercise its own judgment and discretion as to the best mode of ascertaining the fact whether diseased meat is about to be put upon the market. To deny this power to the legislature of the State is to deny the power to establish police regulations at all;

it is to take away from the legislative department the right to use its own discretion as to the best mode of preventing an injury to the public health.

It has been said that the taxing power is the power to destroy, but the police power, if it is worth anything at all, embraces the power not only to destroy property, but to break contracts, and take away life itself; for the power to hang a man for violation of law is an exercise of the police power.

Quarantine regulations are admitted to be within the legislative power of the State legislatures, and yet, when a vessel is stopped at quarantine the healthy and the unhealthy among the passengers and the cargo are detained, and commerce between the States is interfered with. But surely no man will say that the health of a large city should be imperilled rather than a load of dry goods or groceries should be delivered to a consignee.

This Court has held that the question as to whether the sale of an article of merchandise involves danger to the public health is a question of fact and policy which belongs to the legislative department to determine.

In Powell *v.* Pennsylvania, 127 U. S., 678, the oleomargarine law of Pennsylvania was sustained.

That law provided, under a penalty, that—

"No person should sell or offer for sale, or have in his, her, or their possession with intent to sell the same as an article of food, any compound of any oleaginous substance other than that produced from unadulterated milk or cream from the same, designed to take the place of butter or cheese."

The defendant offered to prove that the article in question was healthy; that it contained all the elements of butter produced from pure, unadulterated milk or cream, except

that the percentage of butterine was slightly smaller; that butterine had nothing to do with the wholesomeness of the article, but with the flavor only, and that the article sold was a wholesome and nutritious article of food.

The testimony was excluded upon the ground that whether the article forbidden to be sold was dangerous to the public health, was purely a legislative question with which the courts had nothing to do. This Court said:

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt; one branch of the Government cannot encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. Whether the manufacture of oleomargarine or imitation butter of the kind described in the statute, is or may be conducted in such a way or with such a skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to public health as to require for the protection of the people the entire suppression of the business, rather than its regulation in such a manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and public policy, which belong to the legislative department to determine. And as it does not appear from the face of the statute, or from any facts of which the court may take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of these questions is conclusive on the courts. It is not a part of their functions to conduct investigations into facts, and to sustain or frustrate the legislative will embodied in statutes as they may appear to approve or disapprove of its determination of such questions. In many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of public judgment, exercised by the pressure of public opinion, or by means of the suffrage. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, has determined that the prohibition of sale or offering

for sale for purpose of food, any article manufactured from oleaginous substances, or compounds other than those produced from milk or cream, * * * will promote the public health, and prevent fraud in the sale of such articles. If this legislation is unwise it must be corrected at the ballot-box, and not by the judiciary."

This was not a question of the regulation of interstate commerce, but certain provisions of the Federal Constitution were invoked against the validity of the act, which provisions must yield to the act because it was a police regulation.

This decision would seem to settle the question as to whether the courts will look beyond the plain provisions of the act of the State legislature, to determine whether or not the act is a police regulation.

II. But to return to the nature and extent of the police power in the States, as recognized by the decisions of this Court.

In the case of Patterson *v.* The State of Kentucky, Patterson had sold, within the State of Kentucky, casks of Aurora oil which had been previously branded by an authorized State inspector with the words "unsafe for illuminating purposes." Letters-patent had been granted by the United States for the manufacture of this kind of oil, and it was contended that Congress having power to promote the progress of science and the useful arts, and to secure to inventors for a limited time the exclusive use of their inventions, that no State could prevent or obstruct the exercise of right by any regulations which prescribed tests to which the patented article could not be made to conform. But the Supreme Court of the United States decided otherwise, and held that the right of the patentee, under the Constitution and laws of the United States, "is not granted or secured without reference to the general powers which the several States of the Union unquestionably possess over their

purely domestic affairs, whether of internal commerce or of police." Quoting with approval from Judge Cooley, in his work on Constitutional Limitations, the declaration that—

"In the American Constitutional system the power to establish the ordinary regulations of police has been left to the individual States, and cannot be assumed by the National Government."

And the Court goes on to say that, while it is confessedly difficult to mark the precise boundaries of that power, or to indicate by any general rule the exact limitations which the States must observe in its exercise, the existence of such a power has been uniformly recognized by that Court.

In Gibbons *v.* Ogden, 9 Wheaton, p. 1, Ch., Justice Marshall in commenting upon that clause of the Constitution which provides that: "Congress shall have power to regulate commerce between the States, and with foreign States and with the Indian tribes," says:

"That inspection laws may have a considerable influence on commerce will not be denied, but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of the articles produced by the labor of a country; to fit them for exportation, or it may be for domestic use; * * * they form a portion of that immense mass of legislation, which embraces everything within the territory of the State not surrendered to the General Government. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, are component parts of this mass." (7 Howard, 283.)

That learned Judge denies that the power to pass inspection laws is derived from any power to regulate commerce. The power is derived from a different source and exercised for a

different purpose; it forms a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; it is not so surrendered, and the power not so surrendered embraces the right to pass inspection laws, quarantine laws—health laws of every description. The dangerous article, whatever it may be, is brought within the territorial limits of the State; the State says to the owner, you cannot sell it for human food because it has not been submitted to the test required by the laws of this State; you are not prohibited from bringing beef cattle or hogs or sheep into the State, nor from bringing into the State the meat from cattle butchered in another State, but before that meat can be sold as an article of food it must be submitted to the safest test—the test which is required by the laws of the State where it is offered to be sold for food—this is necessary in order to prevent any danger to the health of our citizens.

In the case of Robbins *v.* The Shelby Taxing District, 120 U. S. Reports, Justice Bradley, in the course of an elaborate opinion, says:

"It is an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws, is when by virtue of its police powers and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community."

Such laws, Justice Bradley says, may legitimately affect

commerce between the States—that is, they are lawful and constitutional, although they may affect commerce between the States, for the word legitimately used in this connection means *constitutionally*.

In Brown *v.* The State of Maryland, so often referred to (12 Wheaton, 456), in which case the State of Maryland passed a law requiring all importers of foreign goods in bales or packages to take out a license before selling the same, this law was held to be unconstitutional, but Chief-Justice Marshall, who delivered the opinion of the Court, in commenting on the clause of the Constitution under consideration, viz., the clause in regard to the regulation of commerce with foreign nations and between the States, says:

"The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the States. * * * The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an exception to the prohibition we are considering."

Now, whilst it must be conceded, as was held in the case just cited, that the commercial power of Congress is co-extensive with the subject on which it acts, and cannot be stopped at the exterior boundary of a State, but must enter its interior, and that the power of importation is accompanied with the power to authorize the sale of the thing imported, that sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part, and must be considered as a component part of the power to regulate commerce; it must be recollected that in the case of Brown *v.* Maryland the exercise of that power on the part of Congress was not brought in conflict with any State legislation providing police regu-

lations, and it is very clear, from the opinion of Chief Justice, above cited from that very case, that it would, in his own language, "form an exception to the prohibition;" that is, an exception to the prohibition upon the States from passing any law regulating commerce between the States. In other words, the power of Congress is ample not only to authorize the introduction, but to authorize the sale of articles imported, until it comes in conflict with that other law of self-defence and self-preservation, the power to enact which has never been surrendered.

And so we may admit that dressed meats are articles of commerce, just as live cattle are articles of commerce; but it does not follow that you must deny to the States the right to determine whether the meats are diseased, and whether the cattle are diseased, and to provide for the use of such tests as in their judgment may be the best means of ascertaining that fact.

In the Texas cattle case, Railroad *v.* Husen (95 U. S., 465) the Court held that the act of the Missouri legislature was neither a quarantine law nor an inspection law, and therefore not enacted in the exercise of the police power of the State; and the learned judge who delivered the opinion concedes that the police power would justify the exclusion from the State of property dangerous to the property of citizens of the State; and as an example, animals having contagious or infectious diseases, and that for this purpose it may pass quarantine and inspection laws, but that such laws may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection against the evils intended to be guarded against.

We admit, also, as was held by the Supreme Court in the case of Nuesler *v.* Kansas (123 U. S., 623), that—

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty, in-

deed, are under a solemn duty, to look at the substance of things whenever they enter upon the enquiry whether the legislature has transcended the limits of its authority, and if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge."

To reach such a conclusion in this case the Court must hold that the statute of the State of Minnesota is a sham and a delusion; that it is a fraud upon the country and upon the Constitution, or that it is a lie upon its face, and this, although the country is confronted with the fact—the undisputed fact—that diseased meat is sold as an article of food; that Congress, representing the whole nation, has passed a law providing for the inspection of the live animal for the purpose of ascertaining whether disease exists or not; that reason and common sense, as well as professional skill, establish the fact that live inspection is the only safe and satisfactory means of ascertaining the fact as to whether disease exists or not.

In the License cases (5 Howard, 577) the Supreme Court defines the police powers as follows:

"The police powers of a State are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions; and whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or to regulate commerce within its own limits, in every case it exercises the same power—the power to govern men and things within the limits of its dominion."

Whenever an article is brought within the territory of a State, it becomes subject to the jurisdiction of State laws, and the State may provide that it shall be so used as not to

injure others; for the maxim that no one shall so use his own as to injure what belongs to another, is the basis of social compact, and the foundation of the authority of government; and whether the subject-matter of State legislation is produced within the State, or is about to be brought into the State, or has been brought there for the purpose of consumption within the State, or to be exported from the State, it is in either one of those cases subject to the police regulations.

Under our political system the powers of Government have been distributed by the people of the United States to two sets of agents, one constituting the Government of the United States, the other, the Governments of the different States, and this was done when the Constitution was adopted. It is the work of the people of all the States, and declares that what is not given or surrendered to the General Government is reserved by the people who made the instrument to the States and to the people; that the power in question is a power not surrendered, but reserved, has been repeatedly held by this Court; and if not surrendered, but reserved, it must exist independently of any power granted to the General Government, and not subordinate to any such granted powers.

JAMES O. BROADHEAD,
for Appellant.

Supreme Court U. S.
FILED,
JAN 9 1890
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

THE STATE OF MINNESOTA,
Appellant,
v.
HENRY E. BARBER.

No. 1,346.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Brief in Behalf of Appellants, Filed by Leave of the Court and Consent of the Parties Herein, by Counsel for the State of Indiana.

WM. B. BURFORD, PRINTER AND BINDER, INDIANAPOLIS.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

THE STATE OF MINNESOTA,
v.
HENRY E. BARBER. } No. 1,346.

Appeal from the Circuit Court of the United States for the District of Minnesota.

BRIEF IN BEHALF OF APPELLANT, FILED BY LEAVE OF THE COURT AND CONSENT OF THE PARTIES HEREIN, BY COUNSEL FOR THE STATE OF INDIANA.

STATEMENT.

This is an appeal from a judgment of the Circuit Court of the United States for the District of Minnesota, in a *habeas corpus* suit brought by the appellee on the ground that he was unlawfully restrained of his liberty by the State of Minnesota, through its officer,

the Sheriff of Ramsey County, under a writ of commitment issued by a Justice of the Peace, upon conviction of the appellee of violating chapter 8 of the General Laws of Minnesota for 1889, entitled, "An act for the protection of the public health, by providing for inspection before slaughter, of cattle, sheep and swine, designed for slaughter for human food." The United States Circuit Court discharged the petitioner on the ground that the statute in question was, as to the petitioner, unconstitutional and void, as violating art. 1, sec. 8 of the Constitution of the United States, which declares that "The Congress shall have power to regulate commerce among the several States," and also art. 4, sec. 2, which provides that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The State of Minnesota appealed to this Court.

The errors assigned present the sole question as to the constitutionality of the statute above referred to, under the two constitutional provisions above mentioned, under the fourteenth amendment, or any other provision of the Constitution of the United States.

The State of Indiana is interested in this case for the reason that it has enacted a law similar in substance to the statute of Minnesota above referred to. For the purpose of showing the similarity of the Indiana and the Minnesota statute we present them below in adjacent columns, with the sections arranged so as to bring the corresponding sections opposite to one another for convenience in comparison:

INDIANA STATUTE, ACTS 1889, CH. 84.

AN ACT for the protection of the public health by promoting the growth and sale of healthy cattle and sheep, making it a misdemeanor to sell the same without inspection before slaughtering within this State, and to authorize cities to appoint inspectors.

[APPROVED MARCH 2, 1889.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall be unlawful to sell, or offer, or expose for sale in any incorporated city within this State, beef, mutton, veal, lamb or pork for human food, except as hereinafter provided, which has not been inspected alive within the county by an inspector or his deputy duly appointed by the authorities of said county in which such beef, mutton, veal, lamb or pork is intended for consumption, and found by such inspector to be pure, healthy and marketable, and for every such offence the accused, after conviction, shall be fined not more than two hundred dollars nor less than ten dollars.

SEC. 2. That the City Council is hereby empowered and required to appoint, in each incorporated city within the county, one or more inspectors and deputies, furnish the necessary blanks and decree the fees for such inspection: *Provided*, That where farmers slaughter cattle, sheep or swine of their own raising or feeding for human food, no other inspection shall be required, or penalty imposed, than such as are already provided by law to prevent the sale and consumption of diseased meat.

MINNESOTA STATUTE, ACTS 1889, CH. 8.

AN ACT for the protection of the public health by providing for inspection before slaughtering of cattle, sheep and swine designed for slaughter for human food.

[APPROVED APRIL 16, 1889.]

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. The sale of any fresh beef, veal, mutton, lamb or pork for human food in this State, except as hereinafter provided, is hereby prohibited.

SEC. 4. Any person who shall sell, offer or expose for sale for human food in this State, any fresh beef, veal, mutton, lamb or pork whatsoever, which has not been taken from an animal inspected and certified before slaughter by the proper local inspector appointed hereunder, shall be guilty of misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred (100) dollars, or by imprisonment not exceeding three (3) months for each offence.

SEC. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs and townships within this State to appoint one (1) or more inspectors of cattle, sheep and swine for said city, village, borough or township, who shall hold their offices for one (1) year and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially co-extensive with the board so appointing them; and said several boards shall regulate the form of certificate to be issued by such inspectors, and the fees to be paid them by the person applying for such inspection, which fees

SEC. 3. Nothing herein contained shall prevent or obstruct the sale of cured beef or pork known as dried, corned or canned beef, or smoked or salted pork, or other cured or salted meats.

shall be no greater than are actually necessary to defray the costs of the inspection provided for in section three (3) of this act.

SEC. 3. It shall be the duty of the inspectors appointed hereunder to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions within twenty-four (24) hours before the slaughter of the same, and, if found healthy and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect. If found unfit for food by reason of infectious disease, such inspectors shall order the immediate removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

SEC. 5. Each and every certificate made by inspectors under the provisions of this act shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were, at the date of such inspection, free from all indication of disease, apparently in good health, and in fit condition, when inspected, to be slaughtered for human food, a duplicate of which certificate shall be preserved in the office of the inspector.

SEC. 6. Any inspector making a false certificate shall be liable to a fine of not less than ten (10) dollars nor more than fifty (50) dollars for each animal falsely certified to be fit for human food under the provisions of this act.

SEC. 7. This act shall take effect and be in force from and after its passage.

Under the above statute of Indiana, prosecutions have been instituted in various counties, and two cases arising out of such prosecutions are now pending on appeal in the Supreme Court of Indiana, one an appeal on behalf of the State in a prosecution in Marion

County against one Phillip Klein, the error assigned being the quashing of the information by the Court on the ground that the statute above referred to is unconstitutional; and the other an appeal in a *habeas corpus* case by the officer of Porter County, who had received a writ of commitment from a justice of the peace of that county against one James E. Harvey, on a conviction of said Harvey under this statute, the Circuit Court of that county having discharged said Harvey, on *habeas corpus*, on the ground that the above statute is unconstitutional.

The decision of this case will, therefore, affect both the validity of the Indiana statute and the result of pending cases which are based upon that statute.

ARGUMENT.

We claim that the statute is valid and constitutional, as an exercise of the police power of the State of Minnesota.

The question involved in this case is, whether the States of this Union may, in the exercise of their right of inspection of articles in common commercial use which are capable of a state, condition or quality which renders them dangerous to life, health and property in commercial, as distinguished from private use, impose conditions upon the inspection, which operate as prohibitions to some individuals engaged in commerce in the article which is the subject of the legislation with citizens of other States, and, if so, what is the extent of their power in imposing such conditions and what tribunal is to judge of that extent.

As bearing upon the determination of this question, we present the following considerations:

I.

A State of this Union, in the exercise of its reserved power to legislate for the benefit of its citizens except as restrained by the fundamental law, which is the power to regulate all commerce (all action and all use of things which affect others than the actor or user) of all persons and things within its territorial limits, may exercise either the police power proper or the paternal police power—or, as it is generally denominated, the police power or the paternal power.

Laws passed in the exercise of the police power proper are laws regulating the commerce (as above defined) of those persons and in those things which are capable of working injury to life, health or property, of themselves in their commercial, as distinguished from their private use, without the voluntary intervention of the person whose life, health or property is injured.

Laws passed in the exercise of the paternal police power, are laws regulating the commerce (as above defined) of those persons and in those things not capable of working injury to life, health and property in their commercial action or use, except as such commercial action or use renders possible or convenient an injurious private action or use by the person to whom the action is directed or to whom the property is delivered.

It is only by the regulation of commercial action that

private action can be affected. To regulate private action directly would be a manifest violation of the rights of life, liberty and property secured to the individual by the fundamental law.

That the police power proper as above defined is included in the power of legislation possessed by the States above defined, is shown by the following definition of the police power given by this Court in the case of *Munn* v. *The State of Illinois*, 94 U. S. 113, at page 124:

"When one becomes a member of society, he necessarily parts with some rights and privileges, which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private. *Thorpe* v. *R. & B. Railroad Co.*, 27 Vt., 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 *How.* 583, 'are nothing more or less than powers of government inherent in every sovereignty, that is to say, the power to govern men

and things.' *Under these powers the government regulates the conduct of its citizens one towards another and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.*"

That a State of this Union possesses the paternal police power is recognized by all the cases in this Court which have upheld or recognized the right of a State to prohibit all commercial use of intoxicating liquors to its own citizens. Intoxicating liquors are not dangerous to life, health, or property, except as their commercial use is accompanied with *voluntary private* use, and such prohibitory laws essentially protect the citizen from his own action and use of the article injurious to himself. *Mugler* v. *Kansas*, 123 U. S., 623.

II.

The grant of the power to the Congress to regulate interstate and foreign commerce is a grant to the Federal Government of the police power, and this police power, when exercised by express legislation (or by a manifestation of the will of Congress to refrain from legislation in a certain direction), is paramount to any State statute enacted in the exercise of the police power of the State, so far as that statute affects interstate or foreign commerce.

The word "commerce," as used in the Constitution of the United States, is thus defined by Chief Justice Marshall in the case of *Gibbons* v. *Ogden*, 9 Wheaton 1, at pages 189, 190: "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes

the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

Intercourse (i. e. commerce), therefore, includes all actions of individual citizens in the exercise of their powers over themselves or their property which have a direct relation to, and effect upon other persons, as distinguished from the actions of individual citizens in the exercise of their powers over themselves or their property, which have a direct relation to and effect upon themselves only.

The power to regulate commerce, therefore, includes, if it does not consist in, the power to legislate regarding all actions of individual citizens directly affecting the other citizens, and affecting them injuriously (since there would be no reason for regulation of beneficial intercourse), in respect to the rights of life, liberty and property, which are the rights and all the rights which a citizen possesses.

The power to regulate commerce and the police power, as defined in *Munn* v. *Illinois*, 94 U. S., 113, are thus seen to coincide, from which we conclude that they are one and the same thing.

The Federal Government, therefore, has the complete power of legislation, including the right to exercise both the police power proper and the paternal police power, over inter-State and foreign commerce (unless the courts shall hereafter hold that the exercise of the paternal power by the Federal Government is opposed to the theory of the Constitution).

By Article 6 of the Constitution of the United States it is provided that all laws made in pursuance of the Constitution of the United States shall be the supreme law of the land.

From this it results that the legislation of the Congress relating to inter-State commerce is paramount to any conflicting State legislation.

So, also, it is said that when the Congress has manifested its will to refrain from legislation of a particular kind, this has the same effect as express legislation directing that inter-State or foreign commerce of the particular kind referred to shall not be subject to State restriction. *Smith* v. *Alabama*, 124 U. S., at p. 473.

The right granted to the Congress to provide for issuing patents for inventions is in derogation of the rights of the individual. The right of an individual under a patent for an invention is subservient to the right of the State to enact legislation in the exercise of the police power proper. *Patterson* v. *State of Kentucky*, 97 U. S. 501.

III.

The only limitation upon the police power proper and the paternal police power, *i. e.*, upon all legislation of a State so far as its own citizens are concerned, is that in the exercise of those powers, the rights of life, liberty and property guaranteed to each citizen by the fundamental law, shall not be infringed. *Powell* v. *Pennsylvania*, 127 U. S., 678.

The effect of Article 4 Section 1 is to secure to every citizen of every State *in any other State* the same rights of liberty and property which the citizens of that State enjoy under the Constitution as against any exercise of legislative power by that State.

The effect of the Fourteenth Amendment is to secure to every citizen of the United States the same rights of liberty and property *in his own State*, as against his own legislature, to which every other citizen of the United States (including citizens of the ~~United~~ other States) would be entitled. The Fourteenth Amendment therefore makes it possible for the appellee in this case, though a citizen of the State of Minnesota, to claim the same rights with respect to his commerce with citizens of other States that those citizens might claim with respect to their commerce with him, but he, like them can only object to the statute in question, because it interferes with his right to liberty and property guaranteed to him by the Constitution of Minnesota.

IV.

Legislation of a State in the exercise of the police power proper may effect commerce between its citizens and persons outside the State, (inter-State or foreign commerce of its citizens). Legislation of a State in the exercise of the paternal police power can effect only commerce which is exclusively within the territorial limits of the State.

From the fact that the State has the power to regulate all action and all use of property within its territorial

limits, it follows that it may exercise both the police power proper, and the paternal police power over all persons and things entirely within its territorial jurisdiction. It follows also, that the State can exercise the paternal police power over such commercial action or use of property only as is within its territorial jurisdiction, since all action or use of property which is injurious only by private use, is regarded as having its location at the place where the private use takes place, and since it would be contrary to the theory of this government to allow the legislature of the States to have an extra-territorial effect, merely for the purpose of preventing individual citizens from injuring themselves.

It follows also, that, inasmuch as some actions and some uses of property which have an injurious operation to the citizen without co-operation on his part, and for which he can not be blamed, are between the citizens of the State and the citizens of other States, it is essential for the complete protection of the life, health and property of the community, against all actions or uses of property injurious to the citizen, without voluntary co-operation in his part and for which he can not be blamed, that the police power proper should have an extra-territorial effect, so as to regulate not only such actions and uses of property between its own citizens, but also between its own citizens and the citizens of other States, to the extent necessary for the protection of the life, health and property of the community, from such action or use injurious to the citizen without *his* voluntary co-operation, and for which he can not be blamed.

All such State statutes have uniformly been held by this court, to have such extra-territorial effect as to inter-State and foreign commerce.

V.

The determination of the question whether certain legislation is an exercise of the police power proper or the paternal police power, or is a violation of the constitutional rights of the citizen depends upon whether the means provided by the statute are reasonably adapted to secure the protection of the community from the injurous action of individuals, or to secure the individual against the consequences of his own injurious action, or are reasonably adapted to accomplish neither of these ends.

The line of demarkation between the police power proper and the paternal police power is difficult to define, because there are few if any actions, or uses of property, which literally affect the actor or user only injuriously; that is, which do not have some injurious effect upon other than the actor or user. The only line which can be drawn, as governing each case, is the line of reasonable adaptation of the means provided by the statute to the object which the statute on its face is designed to attain. The character of the legislation must be determined by the degree of adaptation.

A statute which purports on its face to be designed to protect or preserve the life, health or property of the community from commercial acts or uses of property injurious to him without voluntary co-operation or

blame on his part, and which provides means which are reasonably adapted to accomplish that object, is a valid exercise of the police power proper.

A statute which purports on its face to be designed to protect or preserve the life, health or property of the community, but which provides means which are reasonably adapted to protect and preserve the life, health or property of individual citizens from the commercial action or use of property injurious only by voluntary co-operation on their part for which they are blamable is an exercise of the paternal power (though in a sense such legislation is an exercise both of the police and the paternal power).

If a statute purporting to be enacted in the exercise of either the police or the paternal power is not reasonably adapted to accomplish the objects proper to either kind of legislation (and is not properly enacted in the exercise of any other power), it is void, as interfering with the rights of the citizen with respect to his liberty and property guaranteed by the bills of rights of all constitutions.

VI.

In determining the question of reasonable adaptation of the means provided by the statute to the object proposed to be attained, some questions are for the determination of the Legislature only, as a final tribunal, and others are for its determination only primarily, subject to the determination of the courts, as a final tribunal.

Generally speaking, all questions relating to the *degree* and *standard* of state, condition or quality of persons or things, are determinable as *questions of discretion and policy* by the Legislature only, as a final tribunal; while all questions relating to the *capability* of persons or things of a dangerous state, condition or quality, are determinable, as *questions of fact*, by the Legislature primarily, subject to the determination of the courts, as a final tribunal, upon other facts within the judicial knowledge of the Court, or upon binding precedents.

In the case of *Powell* v. *Pennsylvania*, 127 U. S. 678, a statute of Pennsylvania prohibiting the manufacture and sale of oleomargarine was held to be constitutional, as not interfering with the liberty of the citizen, and hence not discriminating against any class of citizens of the United States.

In that case the Court decided, as a question of fact, from facts within its judicial knowledge, that the article, which was the subject-matter of the law, as an article of food (and hence usually passing by sale from hand to hand), possessed a *capability* of working injury to the public health in its commercial use, by reason of its unknowable condition, dangerous to life, health and property.

The Court, speaking by Mr. Justice Harlan, on page 684, say: "It will be observed that the offer in the Court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that *many*—indeed, that *most*—

kinds of oleomargarine butter *in the market contain ingredients* that *are*, or *may become, injurious to health.* The Court can not say, *from any facts of which it may take judicial cognizance* that such is not the fact. *Under the circumstances* disclosed in the record, and in obedience to settled rules of constitutional construction, *it must be assumed that such is the fact.*"

In that case the Court further decided that they had not the power to decide as questions of fact, the question of the *reasonableness* of the restriction proposed, but that the questions of the nature and the extent of the restrictions were questions of policy and discretion, which the Legislature alone could decide.

The Court say, on page 685: "Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, *the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department alone to determine.* And as it does not appear upon the face of the statute, or from any facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the Courts. It is not a part of their functions to conduct investigations of facts, entering into questions of public policy merely, and to

sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disprove its determination of such questions. The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the Government has in the employment of means to that end is very large."

VII.

In the exercise of the police power proper and the paternal power, the ~~courts~~ *State* may enact both protective and preservative laws. Protective laws act negatively upon action injurious to the community and individual citizens, by way of prohibition. Preservative laws act positively, by constructing means by which all proper action and use of property may be had without injury to the community or to any citizen.

Such negative and prohibitory regulations are protective or criminal laws.

Such positive and constructive regulations are preservative laws. Preservative police regulations are those by which the State establishes highways, bridges, ferries, courts, banks, etc., and all other agencies and means by which intercourse is carried on more safely and conveniently. The case of *Gilman* v. *Philadelphia*, 3 Wall. 713, illustrates this distinction.

All protective or criminal laws enforce the specified prohibition upon personal action or use of property by fine or imprisonment, or by seizure and destruction of property dangerous in commercial use.

VIII.

All prohibition upon personal action or use of property is of two kinds:

1. Prohibition of a designated kind of personal action, or a designated kind of use of property, under penalty.

2. Prohibition of all personal action of a designated class of persons, or of all use of a designated class of things, absolutely, or until some designated condition has been fulfilled, under penalty.

The bulk of the ordinary criminal legislation is made up of laws imposing prohibitions of the first kind.

Those criminal laws imposing prohibitions of the second kind are denominated prohibitory or license laws.

Inspection laws are a species of license laws, since they impose a prohibition upon action or use of property until the conditions, both of inspection and endurance of inspection have been performed.

An "inspection" is a determination of state, condition or quality of persons or things by subjection to some "crucial test," as distinguished from a determination by a judicial examination on testimony and proof other than by inspection. An inspection is a rapid and inexpensive method of trial, as distinguished from a slow and expensive method.

In the case of *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, this Court speaking by Mr. Justice Miller thus defined "inspection:"

"What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken or examined, it is not inspection in any sense whatever."

Inspection laws proceed upon the theory that the whole of any class or aggregation of persons or things which are reasonably suspected of being of a state, condition or quality likely to be injurious to the State or its citizens, may be treated as actually dangerous to the State or its citizens until they have been subjected to and have endured an inspection. The right to inspect is a necessary incident to the right to prohibit.

Prohibitory laws, and license laws (including inspection laws), may be enacted in the exercise of the police power, for the purpose of protecting the life, health or property of the community from dangerous action or use of property by individuals; or in the exercise of the paternal power, for the purpose of protecting the individual citizen from action or use of property injurious to himself; or in the exercise of the taxing power, for the purpose of destroying commerce in any designated class of articles, or enforcing the payment of the tax, by prohibition of action or use until the tax is paid.

Prohibitory and license laws, enacted in the exercise of the police power, are denominated quarantine prohibitory laws and quarantine license laws (quarantine license laws including, as before stated, quarantine inspection laws).

The case of *Turner* v. *Maryland*, 107 U. S., 38, was the case of an export inspection law, designed to protect the reputation of a class of merchants from the consequences of the action of some members of the class. It would seem to have enacted in the exercise of the paternal police power.

This Court, in the case of *Bowman* v. *Chicago and Northwestern Railway Company*, 125 U. S., 465, on page 488, thus defines an inspection law:

"The right of the State to pass inspection laws is expressly recognized in Article 1, Section 10 of the State Constitution, in the clause declaring that 'no State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws.' * * * 'And all such laws shall be subject to the revision and control of the Congress.' The nature and character of the inspection laws of the States, contemplated by this provision of the Constitution, were very fully exhibited in the case of *Turner* v. *Maryland*, 107 U. S. 38. 'The object of inspection laws,' said Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 'is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose.' They are confined to such particulars as, in the estimation of the Legislature and according to the customs of trade, are deemed necessary to fit the inspected article for market, by giving to the purchaser

public assurance that the article is in that condition and of that quality which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things, in respect to which inspection is required, are dangerous or noxious in themselves. It was said in *Turner* v. *Md.*, 107 U. S. 38, 55: 'Recognized elements of inspection laws have always been, quality of the article, form, capacity, dimensions and weight of package, mode of putting up, and marking and branding of various kinds—all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should co-exist in order to make a valid inspection law. Quality alone might be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters.' It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse."

IX.

All articles are subject to quarantine inspection by the State, which, in addition to their capability of a state, condition or quality dangerous to life, health or property, possess the characteristic of " usually passing,

by sale, from hand to hand;" that is, of being usually dealt in markets and intended for immediate consumption in use. All articles of food are within this class.

As to all such articles, the power of inspection is essential to the maintenance of the public health, especially in the more populous communities, where the opportunities for concealing fraud are greater, and ignorance and poverty more common.

As to much of such inspection, it may be doubted whether it is enacted in the exercise of the police power or the paternal power. When the object of the inspection is to prevent the use of those articles which are visibly decayed or deteriorated, the legislation is, in a sense, designed to protect the citizens from the injurious consequences of their own voluntary action in using unwholesome or dangerous articles; yet, on the other hand, such action can, perhaps, not be considered voluntary.

Laws for inspecting things not visibly dangerous are enacted in the exercise of the police power, since the injury to health is caused by the commercial use of the article in connection with *involuntary* and *unintentional* private use, and hence the injury to health is caused by the commercial use of the article.

This is specially true of articles capable of infection that is the capability of becoming diseased, and of conveying specific disease which is itself, of course, infectious. Infection may exist without there being the slightest evidence to the senses of the infection, and for this reason from times immemorial it has been considered the duty of the State to provide the most strin-

gent quarantine restrictions against all such persons or things as are even under suspicion of infection, because of the danger to the health of the community arising from the *possibility* that the person or thing supposed to be infected, might, in fact, be infected. A state of unremovable suspicion of infection has always been considered as a ground of absolute prohibition.

X.

For the purpose of quarantine inspection, manufactured or prepared articles may be placed in the same class with the unmanufactured or unprepared articles when the process of manufacture consists only in the removal from the unmanufactured or unprepared article of those indicia by which alone the infectious or non-infectious condition of the article can be ascertained, without the removal of the possibility of infection. This results from the fact that the State is forbidden to ascertain the state, condition or quality of articles for commercial use by a judicial examination, and must ascertain this fact by inspection or not at all.

Upon persons in their *ordinary* commercial action, common to all citizens, and upon things in their *ordinary* commercial use, for traffic and consumption, the State can impose, for the protection of life, health or property, *i. e.*, for quarantine purposes, an "inspection" only, as a means of determination of state, condition or quality, since to impose a judicial examination requiring proof other than by way of "inspection" in such case, might, by reason of the fact that commercial action and

use of property is dependent upon the expense entailed by such action or use, and the rapidity with which such action may be taken and property may be brought into such use, entirely prevent such commercial action or use of the persons or things designated, and thus work an interference with the liberty of the citizen, and a taking of his property, in violation of the Bills of Rights.

Upon persons engaged in commerce (*i. e.* intercourse) of a peculiar and extraordinary kind which exposes the community to extraordinary danger unless exercised by skilled persons (and perhaps upon some property designed for some extraordinary or permanent use, and capable of working extraordinary danger to the community unless it be in a peculiar state or condition, or of a peculiar quality), the State may impose the burden of a judicial examination upon proof other than by inspection, and hence entailing expense and delay upon the person engaged in such commerce, without violating the constitutional rights of liberty or property. Such persons contemplate a continuing dangerous action, and such property is designed for a continuing dangerous use, and the preparation for such use requires both expense and delay, which give value to the personal services and to the property, so that the expense and delay of the examination in proportion to the value and the danger is not an unreasonable burden upon such commercial use, and does not work a violation of constitutional rights of liberty or property.

The State is prevented from determining the state, condition or quality of persons or things in their ordi-

nary commercial use in any other manner than by "inspection," not only by its constitutional obligation toward the persons themselves engaged in such commerce, but also by reason of its constitutional obligations toward all its other citizens, since, to impose such a judicial examination upon persons and things in their commercial action or use, would, by reason of the great number of persons and things required to be thus examined, create a burden upon the whole community in the shape of courts and officers, which would require for their support taxation amounting to a taking of property.

From the fact that the State can not, and is not bound to protect the life, health and property of its citizens from danger arising from the ordinary commercial action of persons, or the ordinary commercial use of things otherwise than by inspection, it follows that, after the enactment of an inspection law relating to a class of specified things in their ordinary commercial use, the State may prohibit the commercial use of all such members of that class as are permanently incapable of inspection; provided that the inspection of the kind required, and under the conditions imposed, is the only inspection which will effectually accomplish the protection of the life, health and property of the community.

The State may, therefore, for the purpose of protecting the life, health and property of its citizens by an effective inspection, enact provisions regarding the inspection which operate as prohibitions upon some things in their prepared or manufactured state, as things

permanently incapable of inspection, when the process of preparation or manufacture consists only in the removal of those indicia which render an effective inspection possible, and when, in such preparation or manufacture the capability of injury to the community which the thing posesses in its commercial use is not removed.

Such legislation is merely the enforcing, on the part of the State, of the implied contract into which every citizen exercising the business of such preparation or manufacture of things enters, which is, to submit to whatever restrictions the State may impose upon such business, for the protection of the health, life and property of the community. *Munn* v. *Illinois*, 94 U. S., 113.

The principles above stated may be summed up as follows:

It is the function of license quarantine laws enacted in the exercise of the police power proper, to prohibit all ordinary commercial action of persons and all ordinary commercial use of things (meaning by "commercial" all action or use affecting others) which are dangerous to the life, health or property of the citizen without his co-operation and without blame on his part by reason of their deteriorated, but curable, state or condition, or by reason of their poor, but restorable quality, until they have conformed to some requirement designed to restore the persons or things to a state in which they are not dangerous to life, health or property, and have proved such conformity without expense and delay to the State, by submitting to and enduring some "crucial test"—that is an inspection.

For the purpose of license quarantine legislation, all persons and things may be treated as of such dangerous, but curable, state, condition, or quality, which are under reasonable suspicion of being of dangerous state, condition, or quality (by reason of their previous surroundings or their belonging to a class of persons or things capable of such dangerous state, condition or quality), but whose state, condition or quality may be proved, without expense and delay to the State, by their submission to and endurance of some "crucial test" under State supervision required of such persons or things by existing State legislation—that is, an inspection.

It is the function of prohibitory quarantine laws enacted in the exercise of the police power proper, to absolutely prohibit all ordinary commercial action of persons, and all ordinary commercial use of property (meaning by "commercial" all action or use affecting others) which is dangerous to life, health or property of the citizens without coöperation and without blame on his part, by reason of the incurable, deteriorated state or condition, or the incurable low quality of such persons or things.

For purposes of prohibitory quarantine legislation, all persons and things may be treated as of such incurable, dangerous state, condition or quality for ordinary commercial action or use which are under reasonable suspicion of being in a dangerous state or condition, or of such dangerous quality for such commercial action or use (by reason of their previous surroundings, or of their belonging to a class of persons or things capable

of a dangerous state, condition or quality) and whose harmless state, condition or quality for such action or use, can not be, or is, refused to be proved without expense and delay to the State—that is, by submission to, and endurance of, some quick, cheap and crucial test under State supervision, required of such persons and things by existing State legislation—that is, by inspection.

XII.

In determining whether the statute in question complies with all the requirements which have been laid down as above, certain questions arise, some of which are questions of fact which the Court must decide from its judicial knowledge and from precedents, and some of which are questions of policy. Inasmuch as the determination of these questions of fact involves the examination of their determination by the Legislature, the Court will presume the Legislature determined them correctly, and the burden is upon the appellee to show that the Legislature did not decide them correctly. *Powell* v. *Pennsylvania*, 127 U. S. 678.

The question of the *capacity* of the subject matter of the dressed meat law of an infectious condition is a question of fact for the Court. Upon the authority of the case of *Powell* v. *Pennsylvania*, 127 U. S. 678, the question of the capacity or incapacity of the dressed meat for an inspection, which will determine its infectious or non-infectious condition, is not for the Court to decide. The remaining question is as to the extent of the restriction which the State may impose upon commerce

in that commodity for the purpose of rendering it inspectable for commercial use. This we claim under the doctrine of the case of *Powell* v. *Pennsylvania*, is a question to be determined by the Legislature solely as a question of policy.

If, however, this Court should hold that the determination of that question is within its jurisdiction, and that the inspection must be under reasonable conditions, we claim that the conditions imposed are only such as are reasonably necessary to secure the inspection of the commodity in such a way that its infectious or non-infectious condition may be definitely determined.

As bearing upon the determination of these questions of fact we submit the following considerations:

1. Dressed meat is an article capable of an infectious condition.

In support of this proposition we would refer the court to an article in the "Nineteenth Century" Review for September, 1889, entitled "Diseases Caught from Butcher's Meat," by Dr. Henry Behrend, M. R. C. P., which contains a summary of all medical knowledge and belief upon this subject.

2. Dressed meat is an article incapable of an inspection which will determine whether or not it is in an infectious condition.

The process of preparation consists only in the removal of those *indicia* which render an inspection for the purpose of determining the diseased and infectious condition of the meat possible.

Disease makes its appearance in the skin or entrails, and the flesh is the portion of the animal least likely

to show signs of disease. So disease shows in the whole appearance of the animal during life, and the actions of the animal indicate with great accuracy the nature of the disease. It is true that not only does almost no disease show in the meat, when dressed, but that some diseases especially in some stages, by bloating the flesh and filling the blood vessels, give to the diseased meat an appearance of unusual health.

3. The conditions imposed upon the inspection are only such as are absolutely necessary to effect an inspection which will determine the question as to whether the meat is in an infectious or non infectious condition.

The statute provides for inspection within twenty-four hours before slaughter. As before shown, it is essential, in order to determine the presence of infectious disease in the meat, that the inspection should be before slaughter. To render the inspection absolutely effective it should be made at the time of slaughter, so that the entrails may be examined for disease.

In allowing twenty-four hours to expire after inspection the State makes every concession which it can possibly make to the butcher. To allow a longer time to elapse would be to allow other diseases to be contracted and develop after inspection and before slaughter.

This provision, so far as it prohibits the commercial use in Minnesota of meat from animals slaughtered beyond the twenty-four limit of transportation, is a proper prohibition in the exercise of the police power proper, since such meat, like all other meat not inspected within

twenty-four hours before slaughter, is in a state of unremovable, justifiable suspicion and hence a proper subject of absolute prohibition.

The Legislature of Minnesota, in enacting this statute, has decided that the following facts are true, and has made the following conclusions thereon:

1. Meat in the animal is a commodity dangerous to life, health and property in its commercial use without the voluntary co-operation of the person injured, and without blame on his part; and hence a proper subject in the exercise of the police power proper of license by way of unconditional inspection.

2. Dressed meat is a commodity of the same class, similarly dangerous, but by reason of the character of its preparation uninspectable except under conditions, and hence is a proper subject of license only by way of conditional inspection, *i. e.* in the animal, and within twenty-four hours before slaughter.

3. Dressed meat not inspected under these conditions is a commodity in a state of unremovable, justifiable suspicion, and hence a proper subject of prohibition.

XIII.

The appellee can not complain that the statute violates his rights of liberty and property by reason of the fact that it affects him in a different manner in his person or property from that in which it affects other persons.

The appellee in this case, for the purpose of making this claim, stands in the shoes of the citizens of other

States with whom he is carrying on commerce, and may make the same objection on the ground of discrimination against interstate commerce that they may make.

As to citizens of the other States engaged in interstate commerce the statute works no discrimination.

The question of discrimination is to be determined upon the facts within the judicial knowledge of the Court, the presumption being in favor of the validity of the action of the Legislature, as is the case in all cases where the courts have power to examine a question of fact which has been determined by the Legislature. *Powell* v. *Pennsylvania*, 127 U. S. 678.

The statute affects as seriously the small butchers in the outlying districts of Minnesota as it does the great "packer" in Chicago or Kansas City. The small butcher in Minnesota, whose place of business is not located in the midst of some town or city, must bring his cattle to the town or city for inspection, or undergo the delay and expense of obtaining an inspector from the town or city. He can not bear the expense in competition with the butchers favorably located for inspection purposes in the towns and cities.

A further effect of the law undoubtedly is to destroy the business of all butchers in Minnesota towns and cities, except those who are most favorably situated in such towns or cities for cheap and rapid inspection under the statute.

So that the final operation of the law will be to destroy the business of all butchers and packers now engaged in the business of supplying the State of Minnesota with uninspected meat except those who shall so

arrange their business in the towns and cities of the State as to permit of a cheap and rapid inspection of their product before the same is exposed for public sale in the markets—thus accomplishing only what it has been always admitted the State might do in the exercise of its police power—a regulation of a "noxious trade" for the public good by restricting it to a location where the process of manufacture may be supervised for the benefit of the community.

As to all citizens of the United States within the limit from which animals can be transported into any town or city of Minnesota, inspected and shipped back and slaughtered within twenty four hours, except those most favorably located in the towns and cities of Minnesota, the performance of conditions imposed by the statute upon the inspection is impracticable, owing to the laws of competition and trade, and hence impossible. As to all citizens outside that limit, the performance of the conditions imposed is physically impossible. But there is in fact an impossibility of performance of the conditions of the inspection, except by those citizens of the United States, who shall locate their slaughter-houses in favorable situations for inspection in the cities and towns of Minnesota.

XIV.

The statute does not violate any provisions of the Constitution of the United States other than Art. 1, Sec. 8, Art. 4, Sec. 1, and the 14th Amendment, which we submit we have already shown it does not violate.

Congress has never expressly or implicitly manifested

its will with regard to the commerce in dressed beef, and hence there is no paramount legislation in force which can affect this statute.

The statute expressly complies with the provisions of Art. 1, Sec. 10, of the Constitution of the United States, which provides that "No State shall, without the consent of the Congress, lay any imposts or any duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

This provision is a limitation on the taxing power, not on the police power. *Gibbons* v. *Ogden*, 9 Wheaton 1, at p. 201, *per* Marshall, C. J.

If that provision were violated, it would not render the statute unconstitutional as in excess of the taxing power of the State, but would merely give the Congress the right to regulate the fees by its power of "revision and control." *Neilson* v. *Garza*, 2 Woods 287, approved in *Turner* v. *Maryland*, 107 U. S., at p. 55.

XV.

AUTHORITIES.

The Slaughter House Cases, 16 Wallace, 36, decide every principle involved in the case at bar. The statute of Louisiana under discussion in that case, imposed a compulsory inspection before slaughter upon all meat designed for consumption in a district of Louisiana comprising 1,154 square miles, at a certain slaughter-house in that district, and imposed a heavy penalty upon any person or persons violating the provisions of the act.

The act would plainly have been violated by any person who sold, or exposed for sale in the district, meat not so inspected.

The sole question raised as to the whole statute was whether it violated the rights of citizens of Louisiana secured by the fundamental law, which as above shown is the only question which the appellee can or does raise in this case.

There was no question raised as to whether the statute was an exercise of the police power proper or the paternal police power, but we submit that no such question could have been raised in that case or can be in this.

The character of the article itself makes it impossible to doubt that that statute was sustained, as this must be, as an exercise of the police power proper.

The Court ruled directly upon this section of the statute, and were unanimous in upholding it, though Justices held different views on the question whether the statute for other reasons created a monopoly, the majority holding that it did not, which decision was approved by the Court in *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746.

In *The Slaughter House Cases* the Court decided as a question of fact that the commodity in question, dressed meat, was, in its ordinary commercial use, of working injury to the citizen without co-operation and without blame on his part, and that, therefore, the State had the right to restrict that commerce in its discretion, without violating any right to which any individual within its territorial limits was entitled by the funda-

mental law, even if in so restricting the commerce in that commodity the State saw fit incidentally to establish a monopoly.

We quote from the opinion only those portions having a direct bearing on the decision of the case at bar.

The Court, speaking by Mr. Justice Miller, on page 60, thus refers to the section of the statute then referred to:

"Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, *and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the Governor of the State for that purpose.*"

The question of the constitutionality of this provision was directly raised. The Court says (page 60):

"This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meretorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained, and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city."

The Court, in its opinion, says (p. 61):

"The wisdom of the monopoly granted by the Legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are

deprived of their right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

"The power here exercised by the Legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details.

"'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible material and the burial of the dead, may all,' says Chancellor Kent, 'be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbor; and that private interests must be made subservient to the general interests of the community.' This is called the police power, and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries or to prescribe limits to its exercise.

"This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, and enjoyment of private and social life, and beneficial use of property. 'It

extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. * * * And the persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this, no question ever was or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'

"THE REGULATION OF THE PLACE AND MANNER OF CONDUCTING THE SLAUGHTERING OF ANIMALS, AND THE BUSINESS OF BUTCHERING WITHIN A CITY, AND THE INSPECTION OF THE ANIMALS TO BE KILLED FOR MEAT, AND OF THE MEAT AFTERWARD, ARE AMONG THE MOST NECESSARY AND FREQUENT EXERCISES OF THIS POWER. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise."

On page 64 the Court say: "*If this statute had imposed in the city of New Orleans precisely the same duties, accompanied by the same privileges which it has on the corporation which it has created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now.*"

Mr. Justice Field, whode livered the principal dissent ingopinion, in which the other dissenting Judges concurred, said (p. 87):

"In the law in question there are only two provisions which can properly be called police regulations—the one which requires the landing and slaughtering of

animals below the city of New Orleans, *and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished.* In all other particulars the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping and slaughtering cattle within a district below the city embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district *under similar conditions as to the inspection of animals.*"

Mr. Justice Bradley concurred in the opinion of Mr. Justice Field, so far as it relates to the above matter.

XVI.

The case of *Patterson* v. *The State of Kentucky*, 97 U. S. 501, illustrates the same principle. The Court admitted that as a question of fact illuminating mineral oil was capable of a quality which rendered it injurious in its commercial use to the citizen without voluntary co-operation and without blame on his part, and that a statute of Kentucky providing for the inspection of such oil and the condemnation of all below a certain standard was a valid exercise of the police power proper, and hence paramount to the right of an individual to sell mineral oil manufactured under a patent of the

United States. The Court did not discuss the question of the propriety of the extent of the restriction imposed, recognizing that this was for the Legislature alone to determine.

XVII.

The case of *Powell* v. *Pennsylvania*, 127 U. S. 678, as before shown, was decided upon exactly these same principles, and we have no knowledge of any case where this Court has ever departed from the doctrine that a State statute enacted in the exercise of the police power proper, *i. e.* relating to commerce in articles capable of injury to the citizen in commercial use without co-operation or blame on his part and incapable of inspection is not void by reason of the extent of the restriction, or the manner of the operation of a restriction imposed upon every person engaged in the same commerce.

XVIII.

The case of *Bowman* v. *Chicago and Northwestern Railway Company* 125 U. S. 465, contains nothing which is in the least degree opposed to our position in this case.

That case was plainly an exercise of the paternal police power for two reasons:

1. The Iowa statute in question in that case prohibited all importation, whether for commercial or for private use.

2. It prohibited all importation of an article injurious to the citizen in its commercial use only by his voluntary co-operation and private use of the article to his own injury.

The Court, by strong inference, recognize as existing the doctrines which they soon afterwards announced in the case of *Powell* v. *Pennsylvania*, 127 U. S. 678.

In the case of *Bowman* v. *Chicago & Northwestern Railway Co.*, this Court, speaking by Mr. Justice Matthews, said: "It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition or quality, merely on account of its intrinsic nature, and the injurious consequences of its use or abuse."

This amounts to saying that the States can not enact inspection laws in the exercise of the paternal police power which could affect inter-state commerce, since by so doing they violate the liberty of the citizen secured to him by the fundamental law.

The court further says (on page 490): "The exclusive State power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the State laws, and asserted as the State policy, that it shall be excluded from commerce."

This is an assertion of the right of the court to decide as a question of fact, from facts within its judicial knowledge, the nature and capacity of the article in question regardless even of an express legislative declaration regarding its nature or quality.

judgment of the Circuit Court of the United States discharging the appellee from custody was erroneous, and ought to be reversed.

Respectfully submitted,

LOUIS T. MICHENER,
Attorney General for the State of Indiana.
JOSEPH E. McDONALD,
JOHN M. BUTLER,
ALPHEUS H. SNOW,
Of Counsel for the State of Indiana.
By ALPHEUS H. SNOW.

INDIANAPOLIS, IND., January 6, 1890.

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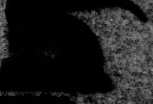

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VOL. 39. TUESDAY, OCTOBER 22, 1889. No. 13.

Entered at the Post-Office at St. Paul, and admitted for transmission through the mails, at Second-Class Rates.

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BROWNING v. REED.

(Circuit Court, D. Indiana. June 19, 1889.)

REMOVAL OF CAUSES—TIME OF APPLICATION.

Under act Cong. March 3, 1887, as corrected by act Aug. 13, 1888, requiring an application for removal from state to federal court to be made at or before the time the defendant "is required by the laws of the state or rule of the state court in which the suit is brought to answer or plead," where, on the third day of the term, defendant is ruled to answer, and files a plea in abatement on the next day, which is overruled on demurrer on the sixth day, a petition for removal, not filed until the seventh day, is too late, even if the plea in abatement suspended the rule to answer, as such rule became operative on the overruling of the plea.

At Law. On motion to remand.

Friedly & Giles, for plaintiff. *Dunn & Dunn* and *J. W. Buskirk*, for defendant.

WOODS, J. This case comes from the Lawrence circuit court, and the motion to remand is made upon the ground that the petition for removal was not presented in time. The record shows that the defendant was duly served with process in the customary form, and on the return-day appeared specially, and moved the court to set aside the summons and return. On the next day—being the third day of the term—the court overruled this motion, and ruled the defendant to answer. On the next day the defendant filed a plea in abatement, to which on the next day the plaintiff demurred, and on the next day this demurrer was sustained. This was on Saturday, the sixth day of the term; and on Monday, the seventh day, the petition for removal was presented. The rule to answer, as entered on the third day of the term, required an answer on the next day, and on that day the application for removal ought to have been presented, unless the filing of the plea in abatement operated to extend the time. Whether or not a plea in abatement has such effect, it is not necessary in this case to decide. If so, it must be upon the theory that, in respect to the time when a removal can be had, the plea suspends the operation of the rule to answer; and, conceding, but not deciding, this to be so, nevertheless, when the plea was overruled on the sixth day of the term, the rule to answer became at once again operative, and, if a removal was desired, it should have been then applied for, and the delay until the next day of the term was, I think, fatal to the right. By the act of March 3, 1887, as corrected by the act of August 13, 1888, the application must be made at or before the time the defendant "is required by the laws of the state or rule of the state court in which the suit is brought to answer or plead to the declaration or complaint of the plaintiff." The conclusion reached seems to be supported by the decision of Judge BLODGETT in *Kaitel* v. *Wylie*, 38 Fed. Rep. 865. See, also, *Dixon* v. *Telegraph Co.*, Id. 377, and *Hurd* v. *Gere*, Id. 537. For the statutes of Indiana in respect to the subject, reference is made to *McKeen* v. *Ives*, 35 Fed. Rep. 801. The motion is therefore sustained.

AUSTIN *v.* GAGAN *et al.*

(Circuit Court, N. D. California. August 5, 1889.)

1. REMOVAL OF CAUSES—CASE ARISING UNDER UNITED STATES STATUTE—PETITION.
   In order to remove a cause from a state to a United States court, under the act of 1887, on the ground that it arises under a statute of the United States, the record must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision in the case.
2. SAME.
   Where the contest is about the facts only, the law being undisputed, there can be no removal.
3. SAME—TIME OF APPLICATION—SUBSEQUENT EXTENSION OF TIME TO PLEAD.
   The application for removal, under the act of 1887, must be made at or before the expiration of the time to answer, as prescribed by the statute or rules of court in force at the time of the service of the summons. Subsequent extensions of time to answer by special orders of the court, or by stipulations of the parties, cannot extend the time to apply for a removal under the statute.
4. SAME—TIME TO FILE BOND.
   The bond required by the statute, as well as a petition, must be filed at or before the time for answering expires, to effect a removal.
5. SAME—FILING NUNC PRO TUNC.
   The court cannot, by an order made after the time to answer has expired, directing the bond to be filed *nunc pro tunc* as of a day prior to such expiration of time, cut off the right of the plaintiff to remain in the state court, which has already become vested and fixed under the statute.

(Syllabus by the Court.)

On Motion to Remand.

James G. Maguire, for the motion.

F. I. Wilson, *contra*.

Before SAWYER, Circuit Judge.

SAWYER, J. One ground of the motion is, that the petition does not present a case, which appears from the facts stated, to arise under the laws of the United States. One party claims the land in dispute as a homestead, and the other that the land is mineral, and therefore, not subject to be entered as a homestead. But it does not appear from any facts stated, that there is any disputed construction of either statute under which the respective parties claim. For anything that appears, both parties may agree as to the construction of the statutes, and the whole case turn upon a question of fact, as to whether the land is mineral land or not, or whether either party has performed the acts conceded to necessary to give the right claimed. Indeed I infer from the facts stated in the petition, that the contest will really be upon the facts, and not the law. In my judgment the record does not present a case for removal under the decision in *Trafton* v. *Nougues*, 4 Sawy. 178, which was followed by Justice FIELD in *Gold-Washing Co.* v. *Keyes*, whose ruling was affirmed in 96 U. S. 199. See, also, *McFadden* v. *Robinson*, 10 Sawy. 398, 22 Fed. Rep. 10; *Hambleton* v. *Duham*, 10 Sawy. 489, 22 Fed. Rep. 465; and *Theurkauf* v. *Ireland*, 11 Sawy. 512, 27 Fed. Rep. 769,—to the same effect. Under any other rule the circuit court would

have jurisdiction—at least until the want of jurisdiction is disclosed at the trial—in every action of ejectment, where either party traces titles to a United States patent, no matter what the matters of contest may be, and thus nearly all the litigation respecting titles to lands lying west of the Alleghany mountains might be swept into the national courts.

The jurisdiction should affirmatively appear upon the record from the facts stated, and not from the mere statement of the conclusion of the petitioner. The petition is insufficient in this respect.

The summons was served on April 8, 1889, which required the parties to appear and answer in pursuance of the provisions of the statute of California, within 10 days after service of summons. The time for answering, then under the laws of California, expired on April 28th. The time for answering was extended from time to time by stipulation of parties till May 29th. On the latter day the defendants answered, and at the same time filed their petition for removal. This was not in time. The party must file his petition for removal "at the time, or any time before the defendant is required by the laws of the state, or the rules of the state court in which the suit is brought, to answer, or plead to the declaration or complaint of plaintiff,"—not at or before the expiration of the extended time within which parties may choose to stipulate for filing an answer, or demurrer. The statute means at any time before the defendant is required to answer by the laws of the state, when the time is specially regulated by the statutes, and by the general rules of practice governing the matter adopted by the courts, when the matter is thus regulated, instead of by specific statutes of the state,—not within the time provided by special orders extending the time, or application by or stipulations of the parties. As we said in *Dixon* v. *Telegraph Co.*, 38 Fed. Rep. 377, the prior act allowed the petition to be filed at any time during the term at which it might first be tried. But the supreme court, repeatedly, held, that the act meant the term at which it could be first at issue, and be ready for trial, provided the parties filed their pleadings at the time appointed by law, whether the court, or the parties were ready for trial or not. And it was also held that the extension of the time of joining issue by orders of the court, or a stipulation for time between the parties, could not extend the time for filing a petition for removal to the next term. *Car Co.* v. *Speck*, 113 U. S. 84, 5 Sup. Ct. Rep. 374; *Gregory* v. *Hartley*, 113 U. S. 746, 5 Sup. Ct. Rep. 743. And this has often been the ruling in this court as will be seen by consulting the reports of its decisions. Even the statute as thus construed was deemed by congress to be too liberal, and in 1887 the act was amended so as to require the petition to be filed at or before the time when the law or established rules of court required the defendant to plead. This law must be construed in the same way as the former, as to the matter of extending the time to plead by the court, or by stipulation of the parties. The party must make his election; and file his petition at, or before the time when his pleading is first due under the law, or rules as they exist when service of summons is made, or he waives his right to a removal. This must be the rule, or the parties by stipulation, or the court by special orders,

on their application, may extend the time to apply for a removal, indefinitely, and the policy of the law be thereby defeated. See, also, *Keeney* v. *Roberts*, and cases cited, 12 Sawy. 39, *post*, 629, and *Theurkauf* v. *Ireland*, 11 Sawy. 512, 27 Fed. Rep. 769.

The policy of the law, is to require parties to take the first opportunity to change the forum, and in default thereof the right is waived. Under the old law, the party was compelled to elect upon first appearing. The petition is too late and the case improperly removed on that ground also. The bond filed with the petition on the last day of the time to answer as extended by the stipulation, contained no amounts of money, an unfilled blank having been left, so that it did not appear for what money the obligors were bound. Afterwards, on June 27th, another bond was filed reciting the defect in the first bond filed and that this bond, which was in due form, was filed in place of the prior bond. The court made an order that it be filed *nunc pro tunc* as of May 27th. But clearly the court could not by this order, give the bond a retroactive effect, so as to cut off a right which had vested in the mean time. Now the first bond was effective, or it was not. If it was effective, there was no necessity for the second, and it was useless. If it was not effective, then the case was not removed by the filing of the petition or until after the filing of the new bond, and this was long after the expiration of the time prescribed by the statute, and the right of the plaintiff to remain and litigate his case in the state court, had become vested and fixed. It was not, thereafter, in the power of the court to divest it by this or any other order. The case was not in fact, or in law removed until after the time for removal had expired.

That the bond was necessary to effect a removal, seems clear. The statute provides for the filing of both a petition and bond containing certain prescribed conditions. The required petition and bond having been filed within the time prescribed, the statute proceeds: "It shall *then* be the duty of the court to accept the said petition and bond, and proceed no further in such suit,"—that is to say, after filing of the prescribed petition and bond, but not till "then." See Desty, Removal, 142. The filing of a bond is required by the same language as the filing of a petition, and it must receive the same construction with reference to the bond, as with reference to the petition.

The paper filed as a bond, was so radically defective, in matters of substance, that it was no bond at all. Consequently, no bond was filed till a month after the stipulated extension of time to answer had expired, and two months after the lapse of the statutory time. It was therefore without effect. In *Burdick* v. *Hale*, 7 Biss. 96, the bond, like that under consideration, had no sum specified—the place for the amount being left blank—and Circuit Judge GRESHAM, and I think rightly, held, the defect to be fatal, as the court was not authorized to dispense with any substantial condition to a removal required by the act. In *Torrey* v. *Locomotive Works*, 14 Blatchf. 269, Judge BLATCHFORD, now of the supreme court, made a similar ruling as to a less vital defect in the bond. A similar decision was made in *McMurdy* v. *In-*

surance Co., 4 Wkly. Notes Cas. 18. Judge COXE in the circuit court, N. D. New York, approved and followed these decisions with reference to a bond which made no provision for payment of costs. *Webber* v. *Bishop*, 13 Fed. Rep. 49. So Field in his treatise on Jurisdiction of the Federal Courts says: "If the bond is manifestly defective, as where no sum for the penalty is inserted, this would be ground for remanding the case to the state court from which it come." Section 190. See, also, section 178, p. 156. There are some decisions holding that slight defects may be cured, as in *Harris* v. *Railroad Co.*, 18 Fed. Rep. 833, and cases cited. But none of them are cases where substantially there was no bond at all, till long after the time for removal had expired. In my judgment the court cannot dispense with any substantial condition to a removal required by the statute, and cannot supply a substantial condition after the time for removal has expired, and the right of the other party has attached. For all of the various reasons indicated, a removal was not effected. The cause must, therefore, be remanded with costs, and it is so ordered.

KEENEY *v.* ROBERTS.

(*Circuit Court, D. California.* July 19, 1886.)[1]

REMOVAL OF CAUSES—ACT OF 1875—TIME OF REMOVAL.

Under the removal act of 1875 a case cannot be removed after the term at which it could have been first tried in the state court, and where counsel do not take the objection it is the duty of the court to do so.

Before SAWYER, Circuit Judge.

SAWYER, J. This suit was commenced in the superior court of the state December 27, 1881. The answer was filed, and the case put at issue, and was ready for trial, May 2, 1882. The petition for removal to this court was not filed till January 25, 1884—nearly two years after it could have been tried. Not less than half a dozen terms of the superior court passed at which it could have been tried. The application for removal was too late, and the removal at that time was not authorized by the act of 1875, under which the petition was filed. *MacNaughton* v. *Railroad Co.*, 10 Sawy. 113, 114, 19 Fed. Rep. 881; *Car Co.* v. *Speck*, 113 U. S. 86, 87, 5 Sup. Ct. Rep. 374; *Gregory* v. *Hartley*, 113 U. S. 745, 5 Sup. Ct. Rep. 743. The court should take the objection, if counsel do not. *Williams* v. *Nottawa*, 104 U. S. 209–211; *Farmington* v. *Pillsbury*, 114 U. S. 144, 5 Sup. Ct. Rep. 807. The petition and record do not show a proper case for removal, and no order for removal was in fact

[1] This opinion was not published at the time of its delivery because of failure to receive a copy of it. It is published at this time on account of its citation in Austin v. Gagan, *ante*, 626.

made. The case is still pending in the state court, and liable, at any time, to be properly called up and tried. As the state court is not obliged to let go its hold, till a proper case for a removal, under the statute, has been presented in the record, and as it has never done so, in fact, it has jurisdiction to proceed, at any time, and try the case. *Gregory* v. *Hartley*, 113 U. S. 745, 5 Sup. Ct. Rep. 743. The case must be remanded to the state court, at the cost of petitioner, and it is so ordered.

SWIFT *v.* SUTPHIN.

(*Circuit Court, N. D. Illinois.* September 13, 1889.)

CONSTITUTIONAL LAW—REGULATION OF COMMERCE—MEAT INSPECTION LAW.

Act Minn. April 16, 1889, prohibiting the sale within the state of dressed meat, unless the animal within 24 hours before slaughter was inspected by state officers and found healthy and suitable for food, having the effect of excluding dressed meat slaughtered outside the state, is unconstitutional as usurping the power of congress to regulate interstate commerce, and abridging the privleges and immunities of citizens of other states.

At Law. On demurrer to pleas.

A. H. Veeder and *M. B. Loomis*, for plaintiff.

C. H. Wood, for defendant.

BLODGETT, J. This is an action of *assumpsit* upon a contract entered into between the parties on the 10th day of May last, whereby it was provided that the parties should go into partnership in the city of Duluth, Minn., for the purpose of selling there, on commission, fresh dressed meats, slaughtered and prepared for market by Swift & Co. at the Union Stock-Yards in Chicago, Ill. The contract further provided that the proposed partnership should continue for five years from June 1, 1889; that the capital of the firm should be $15,000, one-half to be contributed by each party; and further provided that if either party should fail or refuse to enter into such partnership, or perform its conditions as stipulated, the party so failing or refusing should forfeit and pay to the other party the sum of $7,500. The declaration charges that the plaintiff has always been ready and willing to perform his part of the contract, but that the defendant refuses to enter upon said partnership, or in any manner comply with said agreement; wherefore the plaintiff claims damages as stipulated in the contract. The defendant, by way of defense, interposes two pleas, both of which set up, in somewhat different phraseology, an act of the general assembly of the state of Minnesota, approved April 16, 1889, prohibiting the sale of such meats as the partnership was formed to sell, unless the animals from which such meats should be taken had been inspected within 24 hours before slaughtering, and found healthy and in suitable condition to be slaughtered for human food, by inspectors appointed under the provisions of said statute. Plaintiff de-

murs to both these pleas, upon the ground that the statute invoked as a defense is in contravention of the constitution of the United States, and therefore void.

The statute in question purports by its title to be "An act for the protection of the public health, by providing for inspection before slaughter of cattle, sheep, and swine designed for slaughter for human food." The first section prohibits the sale, in the state of Minnesota, of any fresh beef, veal, mutton, lamb, or pork for human food, except as thereinafter provided. By the second section it is made the duty of the several local boards of health of the several cities, villages, boroughs, and townships within the state to appoint one or more inspectors therein, to hold office for one year, and to have jurisdiction co-extensive with the board making the appointment; and it further provides that the standing boards shall prescribe the form of certificate to be issued by the inspectors, and fix the fees for inspection, which are not to be greater than are actually necessary to defray the cost thereof. By the third section it is made the duty of the inspectors so appointed to inspect, within 24 hours before slaughter, all cattle, sheep, and swine to be slaughtered for human food within their respective jurisdictions, and, if found healthy and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect; but if found unfit for food by reason of infectious disease, such inspectors are required to order the immediate removal and destruction of such diseased animals. By the fourth section it is enacted that any person who shall sell, expose, or offer for sale for human food in said state any fresh beef, veal, mutton, lamb, or pork whatsoever, which has not been taken from an animal inspected and certified to be fit for slaughter by the proper local inspector, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $100, or by imprisonment not exceeding three months. By section 5 it is provided that every certificate made by inspectors under the act shall contain a statement to the effect that the animal or animals inspected, which are to be described as to kind and sex, were, at the date of such inspection, free from all indication of disease, apparently in good health, and in fit condition to be slaughtered for human food; and the sixth section provides a penalty for any false certificate made by an inspector. The demurrer to these pleas raises the question as to whether the statute in question is or is not void under the provisions of article 1, § 8, of the constitution of the United States, which clothes congress with power to regulate commerce with foreign nations, and among the several states; and also under the provisions of section 1 of article 14 of the amendments, on the ground that it abridges the privileges and immunities of citizens of other states.

Dressed meats have been from time immemorial articles of local commerce. It may be said that every civilized community has its butchers, engaged in the slaughtering and sale of animals for human food; and the courts will take judicial notice that within the last few years, by means of new appliances for the preservation of such meats, and the facilities for rapid transportation by means of railroads, a large and it may be said a

new business has grown up in the slaughtering and transportation of these dressed meats for human food to distant points from the place of slaughter, so that this business has now become an important item of interstate commerce. The press teems with accounts and statements of the magnitude of the business. The traveler journeying over our railroads meets at almost every point cars constructed and adapted expressly for such business. The records of the patent-office show the invention and patenting of many cars and warehouses specifically designed for conducting such business, and at the late session of congress a committee was appointed by the senate to investigate during the present recess, and report at the next session upon some of the phases and methods of said business; so that there can be no doubt, from common knowledge, that to-day dressed meats for human food are articles of interstate commerce. The act in question purports by its title to be an act for the protection of the public health, by providing for the inspection before slaughter of animals designed for slaughter for human food, and its validity is asserted on the ground that it is a police regulation, coming within the sphere of the state government; but even a cursory glance at its provisions shows that its practical effect and operation is to exclude all dressed meats from animals slaughtered outside of the state of Minnesota. The animals must not only be inspected within 24 hours before they are slaughtered, but they must be inspected within the state; that is, by state officers, who would have no power to act except within the state. It will therefore be assumed that this statute, in effect, excludes and prohibits the sale in the state of Minnesota of dressed meats intended for human food, from animals slaughtered outside that state.

While the state legislatures are clothed with large discretion in the exercise of their police powers for the protection of the health, property, and persons of their citizens, there can be no doubt that this power must be exercised so as not to interfere with matters over which the federal government has exclusive jurisdiction; and no matter how speciously a state statute may be worded, if in its operation it impinges upon the sphere of the federal government it is so far void. In *Mugler* v. *Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, it was said by the supreme court of the United States:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution. * * * Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guarantied by that instru-

ment, or interfere with the execution of the powers confided to the general government."

In *Brown* v. *Maryland*, 12 Wheat. 439, Chief Justice MARSHALL, speaking for the court, said:

"There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. * * * If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

So in the *License Cases*, 5 How. 588, it was said by Mr. Justice McLEAN:

"The federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them, nor inhibited to them. From this it is clear that, while these supreme functions are exercised by the federal and state governments within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the states are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government."

And in *Railroad Co.* v. *Husen*, 95 U. S. 465, Mr. Justice STRONG, speaking for the court, said:

"We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated 'police power.' What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government. * * * Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution. * * * While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspec-

tion laws,—it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

So in *Bowman* v. *Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, a case which involved the constitutionality of the statute of Iowa prohibiting common carriers from bringing intoxicating liquors into that state, Mr. Justice MATTHEWS, in the opinion of the court, replying to the argument that the statute then in question was a proper exercise of the police power, says:

"If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the state, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction; and, as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power; that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. * * * The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation; for it takes from congress, and leaves with the states, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the states determine, what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors, and the produce of fruits other than grapes, stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. * * * It cannot, without the consent of congress, expressed or implied, regulate commerce between its people and those of the other states of the Union, in order to effect its end, however desirable such a regulation might be."

It is urged in behalf of the defendant that while the power to regulate commerce is so far vested in congress that the state law cannot prohibit commercial commodities from being brought into a state, this does not prevent the state legislature from prohibiting the sale after they are brought within the jurisdiction of the state. This position seems to me to be

abundantly answered in the quotation already made from the opinion of the supreme court in *Brown* v. *Maryland*, that the power of congress to regulate the introduction of articles of commerce necessarily implies the right to authorize the sale of commercial articles so introduced; and in the opinion in the *Bowman Case*, heretofore referred to, it is said by Mr. Justice MATTHEWS:

"It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported."

And Mr. Justice FIELD, in his concurring opinion in the same case, says:

"So, in the present case, it is perhaps impossible to state any rule which would determine in all cases where the right to sell an imported article under the commercial power of the federal government ends, and the power of the state to restrict further sale has commenced. Perhaps no safer rule can be adopted than the one laid down in *Brown* v. *Maryland*, that the commercial power continues until the articles imported have become mingled with and incorporated into the general property of the state, and not afterwards. And yet it is evident that the value of the importation will be materially affected if the article imported ceases to be under the protection of the commercial power upon its sale by the importer. There will be little inducement for one to purchase from the importer, if immediately afterwards he can himself be restrained from selling the article imported; and yet the power of the state must attach when the imported article has become mingled with the general property within its limits, or its entire independence in the regulation of its internal affairs must be abandoned. The difficulty and embarrassment which may follow must be met as each case arises."

The statute now in question meets at the border of the state an article of commerce intended for human food, and arbitrarily declares it unfit for such purpose, and prohibits its sale. This seems to me a palpable invasion by the state of the domain of congress. That the state authorities may provide for the inspection of such articles, and prohibit their sale if found, in fact, unfit for use as food, must be conceded; but even the power of inspection is undoubtedly so limited by the first clause of article 14 as that the citizen of another state, owning such article, is to be treated in the same manner as a citizen of the state into which the article is imported. Upon this point the following extract from the opinion in the *Bowman Case* is pertinent:

"If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect."

And the same principle is affirmed in the *License Cases*, 5 How. 504; *Ward* v. *Maryland*, 12 Wall. 418; and many other cases that might be cited.

It is further urged on the part of the defendant, in support of this legislation, that the inspection of the living animal from which the meat to be sold for human food is to be taken is necessary before slaughter in order to accurately determine whether the animal is fit to be slaughtered for such purpose. This reasoning is more specious than sound, and might be applied with the same force to any manufactured, or partly manufactured, article which is the subject of commerce, and especially such as is intended for human food. The wholesomeness of flour, cured meats, corn meal, tobacco, canned fruits, fish, etc., could perhaps be more accurately determined if the raw material from which such goods were produced could be inspected before manufacture; but the admission of the doctrine that a state can interdict the introduction and sale of an article of commerce, unless an inspection is made by the proper officer of said state of the raw material from which such goods are produced, would put all commerce in the state within the control of its legislature. As is said by Mr. Justice FIELD, in his concurring opinion in the *Bowman Case*, "what is an article of commerce is determined by the usages of the commercial world, and does not depend upon the declarations of any state." The authorities, then, seem to me to fully establish the proposition that no article of commerce can be excluded from introduction into and sale in a state by state inspection laws or prohibition laws, and the common commercial usage and course of trade, and not the legislature of the state, determines what are articles of commerce. Tested by these rules, I am of opinion that the statute in question is unconstitutional and void, and furnishes no answer to the plaintiff's case.

Since preparing the notes for this decision, I have been furnished with a newspaper clipping of the opinion by Judges ENSIGN and STEARNS, of the eleventh judicial district of the state of Minnesota, in the *Case of Christian*, *infra*, which arose upon a writ of *habeas corpus*, Christian having been tried for a violation of this act, and sentenced to imprisonment, in which I am pleased to see that these learned judges have, in an able and exhaustive opinion, arrived at the same conclusion as myself in regard to the validity of this statute. The demurrer to the pleas is sustained.

The following is the opinion of Judges STEARNS and ENSIGN, referred to above.

In re CHRISTIAN.

Application for a Writ of *Habeas Corpus*.
Cash & Williams, for relator.
Edmund Sherwood, Co. Atty., for the State.

PER CURIAM. The question to be determined in above proceedings is the validity of chapter 8, Gen. Laws Minn. 1889, entitled "An act for the protection of the public health by providing for inspection, before slaughter, of cattle, sheep, and swine designed for slaughter for human food." Section 1 provides: "The sale of any fresh beef, veal,

mutton, lamb, or pork, for human food, in this state, except as hereinafter provided, is hereby prohibited." Section 2 furnishes the method of appointing inspectors. Section 3 specifies the powers and duties of the inspectors. "Sec. 4. Any person who shall sell, expose, or offer for sale, for human food, in this state, any fresh beef, veal, mutton, lamb, or pork, whatsoever, which has not been taken from an animal inspected and certified before slaughter, by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $100, or by imprisonment not exceeding three months for each offense." If the act is unconstitutional, the conviction and sentence are void, and the petitioner is entitled to his discharge. Ex parte Siebold, 100 U. S. 371, 379, 9 Amer. & Eng. Cyclop. Law, 225, 226, note 3, and cases cited. The effect of the act is to prohibit wholly the importing for sale in this state of any fresh meat whatsoever, and the question arises whether such a prohibition is not a violation of the provisions of the federal constitution.

First. We believe that this act violates the provisions of section 8, art. 1, of the constitution, which gives congress the power, among other things, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Second.* It violates the provisions of section 2, art. 4, of the constitution: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The first clause above mentioned has been called by the courts the "commercial clause" of the constitution. There are certainly principles that have been established by the courts in construing it.

1. The word "commerce," as used in the clause, whether "with foreign nations," "among the several states," or "with the Indian tribes," embraces all transportation, purchase, sale, and exchange of all such commodities as are transported, bought, and sold by the usage of the commercial world. Chief Justice MARSHALL, in Gibbons v. Ogden, 9 Wheat. 1, on page 189, says: "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects to one of its significations. Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes that commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Again, in Brown v. Maryland, 12 Wheat. 419, on pages 446, 447, Chief Justice MARSHALL says: "If this power [in congress to regulate commerce] reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell." In the Passenger Cases, 7 How. 283, Justice MCLEAN, on page 401, adopts a like definition.

2. The power to regulate commerce, as above defined, is vested in congress exclusively; and, if congress has failed to regulate any branch of such commerce, it indicates its will that the same shall be left free, and not that the several states may regulate it. The clause was construed by the supreme court of this state, as regards commerce with the Indian tribes. In Foster v. Blue Earth County, 7 Minn. 140, (Gil. 84,) on page 145, the court say: "It is not necessary to expend argument at the present day to prove that this power for the regulation of commerce granted by the states is vested solely and exclusively in congress. The question has been most thoroughly examined by the supreme court of the United States in reference to that portion of the grant which refers to the Indian tribes, and it has been held by that court that the term 'commerce' comprehends intercourse of every character with the tribes." In Welton v. Missouri, 91 U. S. 275, the court, on page 282, says: "The fact that congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri. The views here expressed are not only supported by the case of Brown v. Maryland, already cited, but also by the case of Woodruff v. Parham, 8 Wall. 123, and the Case of the State Freight Tax, 15 Wall. 232. In the case of Woodruff v. Parham, Mr. Justice MILLER, speaking for the court, after observing with respect to the law of Alabama, then under consideration, that there was no at-

tempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case was not therefore an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity, said: 'But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, [commercial regulations,] and therefore void.'" The question under consideration in the Missouri case was the validity of a Missouri statute declaring that whoever deals in the sale of goods or merchandise, the products of any other state, should be deemed a peddler, and provided for licensing such peddlers. The plaintiff in error was a dealer in sewing-machines manufactured in another state, and was convicted and fined for selling the same without license. As shown above, the act was held void, being an interference with matters confided solely to congress. See, also, Bowman v. Railway Co., 125 U. S. 507, 508, 8 Sup. Ct. Rep. 689, 1062, where the cases are cited by Justice FIELD in his concurring opinion.

3. Naturally flowing from the two propositions above mentioned is a third, viz.: Any act of a state legislature interfering in any manner with the free transportation, sale, or exchange between citizens of different states of or in any article of commerce, is an attempted regulation of such commerce, and therefore beyond the power of the state, and void. There are, it is true, certain regulations of commerce that a state may make, where their operation is, from their very nature, local, and where congress has made no general regulation of the subject. But these regulations are considered more as an aid to, than as a regulation of, commerce. "The subjects, indeed, upon which congress can act under this power [to regulate commerce] are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that congress alone can prescribe." Mobile v. Kimball, 102 U. S. 691, (697.) Then follow regulations of the second class, which a state may prescribe in the absence of congressional regulation,—such as harbor pilotage, buoys, beacons, bridges, dams, etc. See, also, Cooley v. Port-Wardens, 12 How. 299; Pound v. Turck, 95 U. S. 459; cases cited by Justice BRADLEY in his dissenting opinion in Railroad v. Illinois, 118 U. S. 585, 7 Sup. Ct. Rep. 4. It cannot be contended that this act can be maintained as a regulation of the second class of subjects above mentioned.

But counsel for state claim that this act is valid as an exercise of the police power of the state, and as such ought to be upheld. In order to get the correct disposition of this claim it is indispensable to have a clear understanding of the nature and extent of the power, as given by courts and writers. Blackstone defines it to be "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Bl. Comm. 162. "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the like enjoyment of rights by others." Cooley, Const. Lim. 572. Judge REDFIELD, in Thorpe v. Railway Co., 27 Vt. 140, (149,) says: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state. According to the maxim, *sic utere tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." "The police power of the state is co-extensive with self-protection, and is not inaptly termed the law of overruling necessity. It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society." Lake View v. Cemetery Co., 70 Ill. 192. "With the legislature the maxim of law, *salus populi suprema lex*, should not be disregarded. It is the great principle on which the statutes for the security of the people is based. It is the foundation of criminal law, in all governments of civilized countries and other laws conducive to safety and consequent happiness of the people. This power has always been exercised by government, and its existence cannot be denied. How far the provisions of the legislature can extend is always submitted to its discretion, provided its acts do not go beyond the great principle of securing the public safety, and its duty to provide for the public safety within well-defined limits, and with discretion, is imperative. * * * All laws for the protection of the lives, limbs, health, and quiet of persons, and the security of all property within the state, fall within this general power of the government." State v. Noyes, 47 Me. 189, (211.) The above definitions clearly disclose the great principle upon which the power rests, viz., public safety. Any law which goes

beyond this principle, which undertakes to abolish rights, the exercise of which does not infringe the rights of others, or to limit the rights beyond what is necessary to provide for the public welfare and general security, cannot be in the police power of a government.

The question has frequently arisen whether state acts, ostensibly as police reglations, do not intrude on the exclusive right of congress to regulate commerce among the states under the constitutional provision above considered. The supreme court of the United States, in considering this question, has established certain well-defined principles to ascertain what is and what is not an interference on the part of a state with interstate commerce.

First. The police power of a state cannot be exercised with respect to a subject-matter beyond its control. Regulation of interstate commerce is beyond state control, being confided exclusively to congress. Henderson v. Mayor of New York, 92 U. S. 259. This case arose on the validity of an act of the state of New York requiring every carrier of passengers from a foreign country to give bonds that they would not for four years become a public charge, or, in lieu thereof, to pay $1.50 for each immigrant landed. It was sought to be sustained under the police power to protect the state from paupers. But it was held void, being an attempted invasion on the rights of congress. Justice MILLER, on page 271, says: "This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the 'police power.' It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because, whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of congress by the constitution." Again, on page 272, he says: "But, however difficult this may be, it is clear from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states." See, also, exhaustive opinion of Justice STRONG in Railroad Co. v. Husen, 95 U. S. 465, (470, 473.) See, also, Salzenstein v. Mavis, 91 Ill. 391. It follows that if fresh meats, the sale of which are prohibited by this act, are articles of commerce, the act must be held void.

Second. In the exercise of police power over subject-matters within their power the states cannot establish unnecessary or unreasonable regulations, and the courts will judge whether an act is a proper exercise of police power from its purpose and effect, notwithstanding its language or its ostensible purpose. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. Henderson v. Mayor of New York, supra, 268. In Chy Lung v. Freeman, 92 U. S. 275, a statute of California, similar to the statute of New York in the Henderson Case, came up for consideration, and was held void. On page 280, Justice MILLER says: "We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." In Railroad Co. v. Husen, 95 U. S. 465, an act of the state of Missouri was held void which prohibited the driving or carrying of any Texas, Indian, or Mexican cattle through the state between March 1st and November 1st of each year. On page 472, Justice STRONG, giving the opinion of the court, said: "While we unhesitatingly admit that a state may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws,—it may not interfere with the transportation into or through the state beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." Again, on page 473, the court says: "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the state any Texas cattle or any Mexican cattle or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do any injury to the inhabitants of the state or not. * * *' Such a statute, we do not doubt, it is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the constitution of the United States was designed to secure." Again, on the same page: "The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise. And, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. And, as its range sometimes comes very near to the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

The case of Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, contains

an exhaustive discussion of this whole subject, and an able review of the authorities. An act of the state of Iowa, forbidding carriers to bring within the state intoxicating liquors, except under certain regulations prescribed in it, was held void. On page 488, Justice MATTHEWS says: "It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequence of its use or abuse." Again, on page 489, the court quotes with approval from the opinion of Justice CATRON in the License Cases, 5 How. 504, (599,) as follows: "The assumption is that the police power was not touched by the constitution, but left to the states, as the constitution found it. This is admitted; and whenever a thing from character or condition is of a description to be regulated by that power in the state, then the regulation may be made by the state, and congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this: whether the prohibited article belongs to and is subject to be regulated as part of foreign commerce or of commerce among the states. If from its nature it does not belong to commerce, or if its condition from putrescence or other cause is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And, as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. * * * What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular state; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation; for it takes from congress and leaves with the states the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is in effect the controlling one. The police power would not only be a formidable rival, but in a struggle must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning * * * could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." Again, on page 494, he says: "If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the state would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the constitution or congress have intended to limit the freedom of commercial intercourse among the people of the several states."

Respecting the second question above suggested, viz., that it violates the provisions of section 2; art. 4, of the constitution, we think this is clearly shown by the cases above cited. See, also, following cases: Ward v. Maryland, 12 Wall. 418; Tiernan v. Rinker, 102 U. S. 123; Walling v. Michigan, 116 U. S. 446, (459,) 6 Sup. Ct. Rep. 454; In re Watson, 15 Fed. Rep. 511, and note. Now, applying these well-established principles to the act under consideration, we can see no reasonable theory upon which it can be upheld.

First. There is no question that fresh, wholesome meat is an article of extensive commerce among the states at the present time. Of late years it has greatly increased,

and been facilitated by the device of refrigerator cars that are seen daily by the hundreds on all our trunk lines. Meat is transported hundreds of miles in a short space of time, and when it reaches its destination it is as fresh and wholesome as when placed in the car. It is one of the greatest and most important articles of interstate commerce, and it is not in the power of this state to prohibit commerce in it. Justice FIELD, in Bowman v. Railway, supra, on page 501, says: "What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any state." In Telegraph Co. v. Telegraph Co., 96 U. S. 1, Chief Justice WAITE, on page 9, says: "The powers thus granted [to congress to regulate commerce] are not confined to the instrumentalities of commerce, or the postal service, known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." The same may undoubtedly be said of articles of commerce. This consideration alone would seem decisive of the question. Fresh meat is an article of interstate commerce. Its regulation is exclusively in congress; therefore a state law regulating it is void.

Second. Under the principles laid down governing police powers it is equally void. It is not an inspection law. It will not examine fresh meat to see whether or not it is wholesome. It puts all—the good and the bad alike—under the ban of destruction. It utterly destroys interstate commerce in this article, under the guise, it is true, of protecting the public health. But public health does not demand for its protection that wholesome fresh meats, the products of other states, be destroyed. A state cannot exercise such arbitrary power, no matter under what guise.

It is not necessary to enlarge. There is no mode of reasoning by which the act can be sustained, and the prisoner is discharged.

In re BARBER.

(*Circuit Court, D. Minnesota.* September 28, 1889.)

CONSTITUTIONAL LAW—POLICE POWER—INTERSTATE COMMERCE—MEAT INSPECTION LAW.

Act Minn. April 16, 1889, prohibiting the sale within the state of dressed meat unless the animal from which it was taken was inspected by local inspectors appointed thereunder within 24 hours before slaughter, having the effect of excluding from sale all dressed meats from animals slaughtered outside of the state, is not a lawful exercise of the police power of the state, and is unconstitutional, as invading the power of congress to regulate interstate commerce, and as abridging the privileges and immunities of the citizens of other states.[1]

Petition for Writ of *Habeas Corpus.*

W. H. Sanborn, for petitioner.

Mr. Cole and *C. W. Bunn*, for the State.

NELSON, J. The petitioner is brought before me upon a writ of *habeas corpus*. He alleges in his petition that he is restrained of his liberty by the sheriff of Ramsey county under a warrant of commitment issued by a justice of the peace, being found guilty of violating the following act of the legislature of the state of Minnesota, approved April 16, 1889, entitled "An act for the protection of the public health by providing for the inspection, before slaughter, of cattle, sheep, and swine designed for slaughter for human food." "Be it enacted," etc.:

"Section 1. The sale of any fresh beef, veal, mutton, lamb, or pork for human food in this state, except as hereinafter provided, is hereby prohibited."

[1] For opinion of Judge JOHNSTON on the constitutionality of the Indiana statute, see note at end of case, post, 646.

Section 2 provides for the appointment of local inspectors. Section 3 defines the duties of the inspectors, who must inspect the animals within 24 hours before slaughter.

"Sec. 4. Any person who shall sell, expose, or offer for sale, for human food in this state, any fresh beef, mutton, lamb, or pork whatsoever, which has not been taken from an animal inspected and certified before slaughter by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not more than $100, or by imprisonment not exceeding three months, for each offense."

The petitioner alleges that this act of the legislature is in contravention of the constitution of the United States, and void, and that he is entitled to be discharged. The particular provisions of the constitution relied upon are article 1, § 8, which declares that "the congress shall have power * * * to regulate commerce * * * among the several states," and also, article 4, § 2, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The proper proceedings are taken to form the issue. The counsel appearing on behalf of the state claim that the law was passed as a sanitary regulation under the power reserved to the states in article 10 of the constitution of the United States.

The question of the validity of the act is to be determined under the proceedings. Is the law a valid and lawful exercise of state power to protect the public health, or does it pass beyond the constitutional limit, invade the federal domain, and substantially prohibit or burden interstate commerce, and also violate the rights secured to the citizens of the several states? By its title the act purports to be for the protection of the public health, and it is urged that upon its face it does not deal with commerce, and does not directly invade the domain of interstate commerce, but merely regulates the mode of sale of an article of commerce, after it has become a part of the mass of the property of the state. The states have never yielded to the federal government control over internal commerce or their right to self-protection. They have plenary power to protect the lives, health, comfort, and safety of all persons, and for the protection of all property within the state. Health inspection and quarantine laws are among the recognized lawful legislation of a state, and are necessary and advisable for the public welfare. They are self-defensive, and no federal power is trenched upon by their enactment. Such laws may, in many instances, incidentally affect interstate commerce, yet are not necessarily a regulation of it. If the law of the state of Minnesota is a proper and reasonable exercise of its police power, it violates no provision of the constitution of the United States. There has been a conflict for many years and much litigation in respect to the extent of the powers reserved to the states in the federal constitution. This controversy is perennial. The supreme court of the United States has explained in many later cases its previous decisions in regard to the extent of the police power of the states; yet the line of demarcation between the delegated power of congress and the reserved powers of the

states is not defined with such accurate precision that it is easy to determine the boundary limit in all cases. But the supreme court always has stood firm, and tenaciously resisted every attempt of a state to encroach upon the exclusive power of the federal government under the commercial clause of the constitution, and there is a consension of opinion among the judges upon that subject.

The counsel for the state urges that this statute is a reasonably self-protective law. They put it forcibly in this form:

"Whatever the state deems it necessary to do within her own borders for the protection of the health of the citizen she may constitutionally do under the primal and paramount law of self-protection, which is nature's earliest enactment, to which no human legislation ever ran counter. Subject to this only qualification, that from facts apparent on the face of the law or of which the court may take judicial cognizance, the cogent presumptions in its favor are not overthrown by bad faith in its enactment."

If I clearly understand counsel, this is not an unfair statement of the reserved powers of the states. It is only this, in substance: a law to protect health may be enacted by a state, and is valid unless it is a usurpation upon the general government by the invasion of a power exclusively vested in congress. If a state arrogates power so delegated, and exercises control over a subject exclusively confided by the federal constitution to congress, it certainly is guilty of bad faith, for it violates that covenant by which we became one people. The states, as I said, are clothed with plenary police power and large discretion in its exercise for the protection of the public health and comfort, but in order to determine whether the act of the state is really a usurpation of power, the courts are required to look at the effect and operation of the law, and are not bound by mere form. In *Henderson* v. *Mayor*, 92 U. S. 259, Mr. Justice MILLER, speaking of the police power of the states, said:

"Whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it and no urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of congress by the constitution. * * * It is clear, from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void; no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

So, in *Mugler* v. *Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, Mr. Justice HARLAN, speaking for the court, says:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are of necessity limits beyond which legislation cannot rightfully go. * * * The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed are under a solemn duty, to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect

the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution. * * * Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guarantied by that instrument, or interfere with the execution of the powers confided to the general government."

While it must be admitted that the line of distinction between what is a legitimate police regulation and what constitutes an interference with commerce is "dim and shadowy," it is settled that when a law reaches beyond its professed object and into the domain of the federal government, no matter what may be its title, or in what form the details are expressed, it is unconstitutional. The practical effect and operation of this law excludes the importation of all dressed meats to be sold for manufactured food from animals slaughtered outside of the state of Minnesota. It excludes without reference to its quality or condition a commodity known to be an article of commerce by the usages of a commercial world, and an important item of interstate traffic, and practically declares that it does not belong to commerce. It says to all persons engaged in the business of selling dressed meats for food in this state: You must have the animal from which the meat is taken inspected by local inspectors in the state within 24 hours before slaughtered, or suffer extreme penalties. It is not questioned that sound, dressed beef is an article of commerce, but this law is attempted to be maintained as a reasonable regulation of the mode of sale after it has become a part of the mass of property of the state, and it is urged that, as it does not forbid the importation of dressed meat, but only the sale for human food after importation, it is valid. In the argument counsel stated that "private families could import for their own consumption, and that innkeepers and like public resorts are not prevented from buying dressed meat outside of the state and bringing it in for use." If this is a correct interpretation of the law,—if individuals, for private use, as food, and innkeepers, who feed thousands of people, can freely import for use, and the sale is only forbidden,—how does such a measure protect the public health and promote the public welfare? Does it not conclusively show that the legislature was not influenced by considerations for the public health, safety, and comfort, but its policy was directed to other ends? The authorities, however, establish the propositions—*First*, that no article of commerce can be excluded from importation and sale in a state by the statutes like the one in question; *second*, that any act of a state interfering in any way with the free traffic between citizens of different states in any article of commerce is an attempted regulation of such commerce and an invasion of the power exclusively conferred upon congress, and its non-action with respect to any particular commodity is a declaration of its purpose that the commerce in that commodity shall be free. When this law is tested by the decisions of the supreme court of the United States it will be found that it oversteps the limit of the state ju-

risdiction and needlessly obstructs interstate commerce. In *Brown* v. *Maryland*, 12 Wheat. 447, Chief Justice MARSHALL, delivering the opinion of the court, said:

"There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. * * * If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell."

The same principle was asserted in the *License Cases*, 5 How. 588. Mr. Justice MCLEAN said:

"The federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear that while these supreme functions are exercised by the federal and state governments within their respective limitations they can never come in conflict, and when a conflict occurs the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the states are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government."

In *Railway Co.* v. *Husen*, 95 U. S. 465, the court said:

"We admit that the deposit in congress of the power to regulate commerce among the states was not a surrender of that which may properly be denominated 'police power.' What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * But, whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. * * * Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution. * * * While we unhesitatingly admit that a state may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purposes of self-protection, it may establish quarantine and reasonable inspection laws,—it may not interfere with the transportation into or through the state beyond what is absolutely necessary for its self-protection. It may not, under cover of exerting police powers, substantially prohibit or burden either foreign or interstate commerce."

So, in *Bowman* v. *Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, Mr. Justice MATTHEWS, speaking of police power of the state, says:

"If from its nature it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power; that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States."

I forbear further quotation, and refer to the opinion of the court in full. Undoubtedly the state may provide for the reasonable inspection of dressed meat or any article of commerce, and prohibit its introduction into the state if found in fact unwholesome and unfit for use as food, but it cannot encroach upon the power of congress to regulate interstate commerce. It cannot go to the extent of prohibiting the introduction of a sound commercial commodity. A state may exclude any infected article of commerce from reaching the importer, but this law excludes the sound and infected alike, and declares it unfit for human food under the guise of a health regulation. Such a law transcends the police power of a state, for it attempts to obstruct commerce, and if it can exclude sound, dressed meat, it may prohibit the importation and sale of any commodity, and, as said, thus "commercial anarchy and confusion would result from the diverse exertions of power by the several states of the Union." The case of *Powell* v. *Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, does not overrule the decisions above cited. No conflict arose in that case between the police power of the state and the power of congress to regulate interstate commerce, and nothing therein said is inconsistent with the previous decisions of the court in regard to the commercial clause of the constitution. That the law violates article 4, § 2, I think is manifest from the preceding quotations and the authorities cited by counsel. *Ward* v. *Maryland*, 12 Wall. 418; *Tiernan* v. *Rinker*, 102 U. S. 123; *Walling* v. *Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *In re Watson*, 15 Fed. Rep. 511. I have come to the conclusion that the law is not a proper and lawful exercise of the police power of the state, and is unconstitutional. The petitioner is discharged.

The following is the opinion of Hon. WILLIAM JOHNSTON in the circuit court for Porter county, Ind., which is published in this connection on account of the similarity of the Indiana statute to the Minnesota statute discussed in the above cases:

JAMES E. HARVEY *v.* THOMAS HUFFMAN.

JOHNSTON, J. The petition in this case states that James E. Harvey was, on the 19th day of June, 1889, in the city of Hammond, offering to sell, and selling, fresh meat of an animal slaughtered in the state of Illinois, and which animal had not been inspected by the inspector of the city of Hammond, or in Lake county, Ind., before such slaughter; that on the said day he was arrested for such sale and so offering to sell, taken before a magistrate, tried, convicted, and fined; that he refused to pay or replevy such fine, and that a *mittimus* was issued to commit him to the jail of Lake county; that the defend-

ant in the case is the officer to whom said *mittimus* was issued, and who has the petitioner in custody, preparatory to his incarceration in the jail. He therefore prayed that a writ of *habeas corpus* might issue, which writ was granted, issued, served, and made returnable on June 24th. The defendant, in his return to the writ, admits the foregoing facts, and with such return sets up a copy of the proceedings had before the magistrate. To this return the petitioner files his exceptions, putting in question the constitutionality of the act of the legislature under which he was arrested and fined, and which is as follows: "Section 1. It shall be illegal to sell, or offer or expose for sale, in any incorporated city within the state, beef, mutton, lamb, or pork for human food, except as hereinafter provided, which has not been inspected alive within the county by an inspector or his deputy, duly appointed by the authorities of said county in which said beef, mutton, lamb, or pork is intended for consumption, and found by such inspector to be pure, healthy, and merchantable; and for every such offense the accused, after conviction, shall be fined not more than two hundred dollars, nor less than ten. Sec. 2. That the city council is hereby empowered and required to appoint in each incorporated city within the county, one or more inspectors and deputies, furnish the necessary blanks, and decree the fees for such inspection: provided, that where farmers slaughter cattle, sheep, or swine of their own raising or feeding for food, no other inspection shall be required, or penalty enforced, than such as are already provided by law to prevent the sale and consumption of diseased meats. Sec. 3. Nothing herein contained shall prevent or obstruct the sale of cured beef or pork known as dried, cured, or canned beef, or smoked or salted pork, or other cured or salted meats."

Section 1119, St. Ind. 1881, provides, among other things, that "no court shall have power to inquire into the legality of the judgment or process whereby any party is in custody upon any process issued on any final judgment of a court of competent jurisdiction." This might at first blush appear to deprive this court of authority to issue the writ; but, notwithstanding this provision, the validity of a judgment may always be assailed on the ground that the act of the legislature under which the indictment was found is unconstitutional. An unconstitutional law is void, and is no law. The offense created by it is not a crime, and conviction under it is illegal and void. Ex parte Siebold, 100 U. S. 371. If this statute is constitutional and valid, then the relief prayed for cannot be granted; otherwise the petitioner is entitled to the benefit of the writ, and should be discharged. Courts are loath to interfere, and should be very guarded and careful in rendering any opinion that destroys the effect of an act of the legislature; but when such act is clearly unconstitutional they should not hesitate so to pronounce it.

I shall first consider the case with reference to the first exception to the return. If the act in question does not interfere with interstate commerce, then, as to that exception, it is valid. If it does so interfere, it is an assumption of power on behalf of the state beyond its authority, and is unconstitutional and void. It was this exercise of power by the several states over matters which could only be safely intrusted to national authority which rendered the original articles of confederation only a rope of sand; and the confusion produced by the hostile interests of the several states led to the adoption of our present constitution. As Chief Justice MARSHALL has stated the rule on the subject: "The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce, on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, a matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." Brown v. Maryland, 12 Wheat. 446. The provision referred to in the constitution of the United States is section 8, art. 1, which provides that congress shall have the power "to regulate commerce with foreign nations and among the several states." Any law, then, of any state, which contravenes this provision of the constitution, is null and void. Does, then, this statute of Indiana attempt to regulate, or does it interfere with, interstate commerce? True, it is entitled an act for the protection of the public health by promoting the growth and sale of healthy cattle and sheep; yet, in whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect. This statute amounts to a prohibition against the introduction into our state for consumption of all dressed fresh meats. None other can be marketed in our cities except such as has been inspected alive within the bounds of

the county and state in which the city is situated, or such as farmers within the state may have raised or fed and slaughtered. It is well known that dressed fresh meat has become an important article of commerce, and is quite extensively shipped from one state to another, as well as into foreign countries. In fact, in very many of our cities our meat markets are largely supplied with fresh meats shipped from adjoining states. It is, then, judged by the authorities on the question, an article of interstate commerce. Whenever an article has begun to move as an article of trade from one state to another, commerce in that commodity between the states has begun. The Daniel Ball, 10 Wall. 557; Kidd v. Pearson, 128 U. S. 11-25, 9 Sup. Ct. Rep. 6. That the transportation of property from one state to another is a branch of interstate commerce is undeniable. Railroad Co. v. Husen, 95 U. S. 469. In Webster's Unabridged Dictionary "commerce" is defined as "the exchange of merchandise on a large scale between different places or communities." This embraces two distinct ideas: First, that of exchange in its largest sense, including barter,—the giving of one commodity for another; and sale,—the exchange of an article of property for money, the representative of all values. From this definition it will be seen that there can be no commerce unaccompanied by exchange or sale. The other idea embraced in the definition is that of transportation; for, to constitute commerce, the exchange must be between different places or communities; and any law that either prevents the transportation or sale of merchandise totally destroys commerce by the exercise of that power alone. Commerce, then, involves the idea of carrying the commodity intended for exchange to another place, where, as we may say, the market is to be held, and the sale accomplished. Hence, without both transportation and liberty of sale, there can be no interstate commerce.

No power of congress has been more jealously guarded against usurpation than this; and the attempt of different states in varied form to invade it in pursuit of some partial and temporary advantage, and the uniform and wise ruling of the supreme court of the United States against all attempts to evade and avoid this exclusive power of the national legislature, is one of the most interesting subjects of federal jurisprudence. In 1872 the legislature of Missouri passed an act providing that no Texas, Mexican, or Indian cattle should be driven or otherwise conveyed into or remain in any county of the state between the 1st day of March and the 1st day of December in each year, except as the same were conveyed through the state by railroad or steam-boat. This statute, in practical effect, is not far different from the one under consideration. Each, in effect, amounts to a prohibition of certain articles of commerce. The supreme court of the United States pronounced this statute an invasion of the exclusive power of the national legislature, an interference with interstate commerce, and therefore unconstitutional and void. Railroad Co. v. Husen, 95 U. S. 465. In this case the court says: "It is a plain regulation of interstate commerce,—a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States to congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive." Again, the court says: "Transportation is essential to commerce, or, rather, it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority, is regulation." A like statute of the state of Illinois was for a like reason held void in Salzenstein v. Mavis, 91 Ill. 391, overruling the prior case of Yeazel v. Alexander, 58 Ill. 254. To the same effect with the foregoing are the following authorities: Bowman v. Railroad Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062; Case of State Freight Tax, 15 Wall. 232; Ward v. Maryland, 12 Wall. 418; Welton v. State of Missouri, 91 U. S. 275; Henderson v. Mayor of New York, 92 U. S. 259; Chy Lung v. Freeman, Id. 275; Mining Co. v. Auditor General, 32 Mich. 488.

Again, the power vested by the constitution in congress to legislate upon the subject of interstate commerce not only extends to the transportation, but to the power and right to vend, the articles of commerce when transported to their destination. On this subject Chief Justice MARSHALL says, in Brown v. Maryland, 12 Wheat. 446, 447: "If this power [to regulate commerce] reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell." The power vested in congress by the constitution governs property which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation, until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a state

from any burden imposed by reason of its foreign origin. Welton v. State of Missouri, 91 U. S. 275. It may, however, be contended that the act in question is a proper exercise of the police power of the state, and as such ought to be upheld. As a police power of the state in its range comes very near the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any intrusion. "What the police power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety." Railroad Co. v. Husen, 95 U. S. 470, 471. It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state. Thorpe v. Railroad Co., 27 Vt. 149. "It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases, * * * and would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having dangerous or infectious diseases. * * * But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confined exclusively to congress by the federal constitution. It cannot invade the domain of the national government. Railroad Co. v. Husen, 95 U. S. 471; Salzenstein v. Mavis, 91 Ill. 391. It is, then, no answer to the charge that such regulation of commerce by a state is forbidden by the constitution, to say that it falls within the police power of the state; for, to whatever class of legislative powers it may belong, it is prohibited to the states, if granted exclusively to congress by that instrument. In Graffty v. City of Rushville, 107 Ind. 511, 8 N. E. Rep. 609, our own supreme court says: "The conclusion plainly deducible from the decision is that neither states nor municipalities can enforce any law or ordinance the effect of which is to embarrass commercial communication between the different states, or to discriminate against the products of one state, or exact licenses from persons residing in foreign states which are not required of its own citizens under like circumstances." In the case of Telegraph Co. v. Pendleton, 95 Ind. 12, the court says: "We think, however, that the ultimate conclusion deducible from the later decisions is that the states cannot embarrass commercial communication, abridge the freedom of commerce, discriminate in favor of the products of one state, lay burdens upon the instruments of commerce, or exact licenses from persons * * * engaged in interstate commerce." In Bowman v. Railroad Co., 125 U. S. 465–494, 8 Sup. Ct. Rep. 689, 1062, the supreme court of the United States says, in discussing the Iowa prohibitory statute: "If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article the use or abuse of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or all of articles that it may select as coming into competition with those which it seeks to protect. The police power of the state would extend to such cases as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion which would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the constitution or congress have intended to limit the freedom of commercial intercourse among the people of the several states." It would hardly be expected that such a court would hold that a state may not restrict traffic in alcohol, (which possesses no virtue for food or drink,) but may absolutely prohibit all commerce in fresh meats.

The act of the legislature under consideration makes no distinction between the good and bad, but all alike is indiscriminately condemned. The act provides that all uncured meat from every other state, the good, the pure, and the wholesome, with the tainted and the diseased, shall alike be excluded from the cities of the state; and this, it is said in the title of the act, "for the protection of the public health." The third section of the act provides "that nothing herein contained shall prevent or obstruct the sale of cured beef or pork known as dried, cured, or canned beef, or smoked or salted pork, or other cured or salted meats." Note the use of the word "prevent" in this section. Its employment here tends to the conclusion that the legislature understood the first section had prohibited the sale of uncured meats from other states. It was this which, in the opinion of the law-makers, rendered the proviso necessary, saving other meats from its operation. By this third section all kinds of meats, cured, salted, smoked, or dried, no matter how badly the animals from which they were taken were diseased, nor from whence they came, are welcome to admission, and the market is open and free. Thus pure, dressed, fresh beef is excluded, and tainted and diseased canned, salted, smoked, and dried meats are invited. It seems apparent that the purpose of the act was to exclude foreign dressed meats from the city markets of Indiana; and, if such be the case, a consideration of the police powers of the state is unnecessary. Nor can the legislation be sustained as a mere inspection law. The state of Indiana need not admit to her markets meat which is unfit for human food, and she

may take such steps as are necessary to ascertain whether or not it is so. When she has ascertained that it is non-commercial, she may exclude it; but no declaration, however solemn, and no pretext, however specious, will authorize her to exclude a product which is pure and harmless. It does not provide for the inspection of the commodity for the purpose of ascertaining its quality. It proceeds upon the theory that all uncured meat is noxious and injurious to health. It excludes it in advance and without examination to ascertain its condition. It pronounces a judgment without a hearing. All uncured meat is condemned, interdicted, excluded. It has never been regarded as within the legitimate scope of the inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse. The very meaning of inspection is that there should be an examination, and not an exclusion without a hearing. The object of inspection laws is to improve the quality of the articles produced by the labor of a country to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. Rep. 44; Gibbons v. Ogden, 9 Wheat. 203. They are deemed necessary to fit the inspected article for the market by giving to the purchaser public assurance that the article is in that condition and of that quality which makes it merchantable, and fit for use or consumption. They are not founded on the idea that the things in respect to which inspection is required are dangerous and noxious in themselves. Bowman v. Railroad Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062. If the state of Indiana has the power to enforce such a statute, then with equal propriety it may exclude every other product of interstate commerce. It may exclude flour for the reason that the grain from which it was ground was not inspected within the county and state where it is to be consumed; sugar, because it is produced and refined in another state; fruits, because our own soil will or will not produce them; in fact, everything shipped us for home comfort and consumption. And so likewise may other states prohibit the shipping of those articles into our state. The great state of Pennsylvania may prohibit the introduction of its coal into our state; Illinois may prohibit the shipping of its merchandise to us; Michigan, her fruits and lumber; and so on. This policy might thus be extended until in effect we would become as isolated and walled in as a Chinese city.

Another provision of the constitution of the United States with which this act appears to come in conflict is section 2, art. 4: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Inasmuch as a resident of the county—for example, of Lake county—is entitled to have his animal inspected at home on his own premises, and the citizen or resident of Porter county, Ind., or of Cook county, Ill.,—each adjoining Lake,—is obliged to produce his animals for inspection at some point in the latter county, remote from his home and his farm, it is an unauthorized and unjust discrimination, and obnoxious to the constitutional provision above named.

Ward v. Maryland, 12 Wall. 418, is a case where the question of the constitutionality of a statute of Maryland was called in question. This statute provided that all resident traders should take out a license to do business ranging from fifteen to one hundred and fifty dollars, and that a non-resident trader should take out a license, for which he should pay three hundred dollars. The court pronounced the statute void on account of its imposing a discriminating tax, and being in conflict with the foregoing provision of the constitution. To the same effect is Tiernan v. Rinker, 102 U. S. 123. In Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454, the court says a tax imposed by a statute of a state upon an occupation which necessarily discriminates against the introduction and sale of the products of another state, or against the citizens of another state, is repugnant to the constitution of the United States. Other reasons might be given and authorities cited, but it is unnecessary to further prolong this opinion. I have no doubt but the sole purpose of the act was to exclude foreign dressed meat from the city markets of Indiana. The act, therefore, invades the exclusive right of congress conferred on it by the constitution, and is void. The exceptions to the return to the writ are sustained, and the petitioner is discharged.

FELLOWS *et al. v.* WALKER, Auditor, *et al.*

(Circuit Court, N. D. Ohio, W. D. June 7, 1889.)

1. CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS.
   Act Ohio Jan. 22, 1889, which is equally applicable to all cities of a certain class, is not unconstitutional as a special act because there may be but one city of that class.
2. SAME—TAXATION—PUBLIC PURPOSES.
   The fact that the act authorizes the issuing of bonds for the purpose of supplying municipal corporations and their citizens with natural gas does not render it unconstitutional as exercising the power of taxation for a private purpose.
3. INJUNCTION—AGAINST MUNICIPAL CORPORATION.
   Injunction will not lie against the issuing of such bonds on the ground that taxation will have to be resorted to for their payment, when the act provides that the revenue derived from the sale of gas is to be applied to the payment of the principal and interest of said bonds.

On Application for Injunction.

E. D. Potter, Jr., *Doyle, Scott & Lewis*, and *Stevenson Burke*, for complainants.

W. H. A. Read, City Sol., *G. W. Kinney*, and *Brown & Geddes*, for defendants.

JACKSON, J. This is an action brought by Fellows and others, non-resident tax-payers of the city of Toledo, against the city of Toledo and its officers, to enjoin the defendants from executing and selling $75,000 of bonds issued by the city for the purpose of securing natural gas and piping the same to the city of Toledo, upon the ground that the act of the legislature authorizing such issue is unconstitutional. Application is made for a preliminary injunction.

Defendants urge that the bill fails to show necessary jurisdictional facts, in that it does not appear that any one of the complainants is interested to the extent of $2,000, and that different tax-payers cannot unite their several interests for the purpose of making up the jurisdictional amount. While the court is of the opinion that the real subject-matter of controversy is the validity of the obligation incurred by the entire issue of $75,000 of bonds rather than the separate interest of each complainant therein, still the question is one of such doubt that the court does not now decide it, and prefers to express no opinion thereon at this time. The application must therefore be decided upon the bill, answer, and affidavits. It should be said at the outset that the court has nothing whatever to do with the questions of the policy of such legislation or the manner of carrying out the same, or the benefits to be derived by the corporation therefrom. These are questions for legislative discretion and determination. The question for this court to determine is simply whether the act in controversy was a proper exercise of constitutional legislative power. The constitutionality of the act is denied because it is said to be a special act conferring

corporate powers; that it is special because the city of Toledo is the only city of the third grade of the first class in the state of Ohio, and the only city to which this act is or can be applicable. But this objection cannot be sustained. It is well settled by authority in Ohio that the classification of municipal corporations is valid, and that legislation which is applicable to a class is general, although there may be at that time but one city in that class. The act in question is equally applicable to all cities of the third grade of the first class, whether now belonging thereto or hereafter coming into that category. The answer denies the averment of the bill that Toledo is the only city of the state to which the act is or can be applicable, and it does not appear that it is the only city that is or can be a city of the third grade of the first class.

It is next insisted that the act is made to take effect upon the approval of some authority other than the general assembly. But the language of the act is otherwise. As a matter of fact, it is made to take effect and be in force from and after its passage. Moreover, it is an enabling act designed for those cities, which accept it in the manner and upon the conditions specified, and takes effect from the date of its passage. It stands upon the same basis precisely as general acts authorizing the creation of corporations.

The next and the main ground upon which the bill rests and the injunction is sought is that the supplying of municipal corporations and their citizens with natural gas is not a public purpose or use for which the taxing power which is necessarily involved can be properly exercised. It is urged that while the act authorizes the city to procure natural gas for its own use and for use in public buildings, etc., (which complainants concede would be a public use,) the main object and primary purpose of the act is to enable the city to supply its individual inhabitants with fuel for private use and consumption at a cheaper rate than they can obtain it from other sources; that such being, as complainants insist, the direct object and purpose of the act, the taxing power of the city cannot be constitutionally exercised for the attainment of such an object. In the first place, this is not, in the opinion of the court, a proper view to take of the legislation. The court would not be justified from a reading of the act in saying which was the primary object and purpose of the act, even assuming (what the court does not admit) that the supplying of private individuals with gas is a purely private advantage. It could just as well be urged that the primary object of the bill is to furnish gas for the city and the city buildings, etc., and that the supplying of the citizens was merely incidental thereto, as to urge that the primary object of the bill is to supply individuals, and that the furnishing of the city and city buildings, etc., is incidental. The act, upon its face, is not open to such splitting or subdivision. As a whole, it stands on the same footing as legislation for furnishing water and illuminating gas. It calls for the exercise of only the same powers as are constantly exercised by municipal corporations in supplying the city and its citizens with manufactured gas for illuminating purposes, and in furnishing water for public and private use. But even conceding that the primary

object of the act is to enable the city to supply its individual citizens with natural gas for fuel or illuminating purposes, the court is unable to say that the grant of such a power is in excess of the legislative authority. Unquestionably the legislature may authorize a city to furnish light, or facilities for transportation or water, to its citizens, with or without cost, as the legislature or city may determine. So long as the act is for the benefit of the public or the entire municipality, or all the citizens of the municipality, it does not lose its character as an act for a public purpose so as to become private in the sense that prevents the exercise of the power of taxation. The case of *Association* v. *Topeka*, 20 Wall. 655, is an illustration of an attempt to exercise the taxing power for a purely private purpose. The benefit was to one private individual, the bonds were issued to him by name, the aid was to him and his private business alone. But here the benefits and the aid are to the city in its public, corporate capacity, and to every inhabitant thereof equally and alike. The court is wholly unable to distinguish this act from those conferring power upon municipalities to acquire and operate gas-works and water-works, and in connection therewith to furnish gas and water to the individual inhabitants. And it is of no consequence whether this source of supply, either of gas or water, is wholly within or wholly without the corporate limits of the city. The question of public interest determines the question of right to supply gas and water, and not the mere location of the works or source of supply. In *Walker* v. *Cincinnati*, 21 Ohio St. 14, and in *Coke Co.* v. *Hamilton*, 37 Fed. Rep. 832, decided by the circuit court of the United States for the southern district of Ohio, it has been settled that the legislature of Ohio has authority under the constitution of that state to invest municipalities with such powers as are conferred by this act. Since the decision in *Sharpless* v. *Philadelphia*, 21 Pa. St. 147, it is no longer an open question whether municipalities may engage in enterprises such as the one contemplated by the act in question in this case. The court does not undertake to define the line which distinguishes public from private uses. Nor is it necessary or even possible to do so. It is enough to say that, in the opinion of the court, the act of January 22, 1889, authorizing the city of Toledo to issue bonds for natural gas purposes, is clearly within the general scope of legislative power, is for a public use and purpose, and is not in contravention of any of the provisions of the constitution. The court being of the opinion that the legislation is valid, it follows, of course, that the injunction applied for must be refused.

But even if these questions were open to doubt in the mind of the court, it does not follow that complainants would be entitled to an injunction, because it does not necessarily follow that taxation will have to be resorted to for the payment of these bonds. The act provides that the revenues derived from the sale of gas are to be applied to the payment of principal and interest of the bonds, and these revenues may be sufficient to meet the bonds without resort to taxation.

Injunctions are not granted in cases like the present, except where complainants' rights are clear, and where an injury more or less irrepa-

rable is likely to result to complainants unless the defendants are enjoined. In this case complainants' rights are not clear, and the injury likely to result to them is not shown to be irreparable or even serious. On the other hand, the allowance of an injunction would be attended with serious and possibly irreparable loss and damage to the city of Toledo.

Many other reasons might be given, but it is sufficient to say that the legislation in question is not open to the objections presented by the bill, and therefore complainants are not entitled to the injunction. It is accordingly denied.

HARRISON *v.* ULRICHS *et al.*

(Circuit Court, S. D. California. August 12, 1889.)

1. EJECTMENT—EVIDENCE.
In an action of ejectment for land in California, where both parties assert title to the premises under patents of the United States, issued upon concessions of former governments, confirmed by the tribunals of the United States, the controversy can only be determined by reference to those concessions, or by the proceedings had for their recognition and confirmation under our government.

2. PUBLIC LANDS—TERRITORY OF UPPER CALIFORNIA—ISSUE OF PATENTS.
A grant made by the superior political chief of the territory of Upper California, in conformity with the colonization law of Mexico of 1824, and the executive regulations of 1828, followed by the ceremony of juridical possession, by which, after citation to the neighboring proprietors to be present at the proceeding, the land was measured, its boundaries marked, and the grantee put in possession, vested the title in fee in the grantee, subject only to the possibility of its being divested by the refusal of the departmental assembly to give its approval to the grant. A patent of the United States, issued upon a title of that character, confirmed by the tribunals of the United States, and located by the executive officers of the United States, is unaffected by a subsequent patent, based on a confirmation of a title depending upon the validity of an order made by a governor of California, commissioned by the Spanish crown, which order did not in itself convey any interest in the land, and was not followed by any proceeding which purported to have that effect.

3. ADVERSE POSSESSION — RUNNING OF STATUTE AGAINST THE SPANISH CROWN.
Under the law of Spain and Mexico, mere possession, however long continued, of any portion of the public domain, under an instrument which did not purport to transfer the property, did not create a title which would enable the possessor to hold the land against the Spanish crown or against the Mexican government.

4. PUBLIC LANDS—MEXICAN GRANTS.
Under the regulations of Mexico of 1828 it was the duty of the governor, and not of the grantee, to submit to the departmental assembly grants issued by him, for their approbation. His neglect in this respect suspended the definitive validity of the grant; that is, prolonged the liability of the estate to be defeated by the action of the assembly and of the supreme government thereon, but did not operate to divest the estate already vested in the grantee.

5. SAME—ISSUE OF PATENTS.
By a patent issued by the United States upon a grant made in conformity with the colonization law of 1824, followed by the ceremony of juridical possession, confirmed and located by the United States, whatever title is in the United States passes to the patentee. After a patent so issued, no title remains in the United States which they could convey by any subsequent patent. However conclusive against the United States, and parties claiming un-

der them by title subsequent, a patent may be, it in no respect impairs the right of a previous patentee to contest the title upon which the subsequent patent has issued for the premises.

6. SAME—POWER OF SPANISH POLITICAL CHIEF.

Whether the political chief of the territory of Upper California, under the the Spanish crown, possessed any power to alienate the fee of any portion of the public doman, doubted.

(*Syllabus approved by the Court.*)

At Law. Action of ejectment.

William Matthews and *Wells, Van Dyke & Lee*, for plaintiff.

Rhodes & Barstow, Chapman & Hendricks, and *J. W. Towner*, for defendants.

Before FIELD, Justice, and SAWYER, Circuit Judge.

FIELD, Justice. This is an action for the possession of land in the county of Los Angeles, Cal., amounting to 13,723 acres and a fraction of an acre. It is submitted to the court without the intervention of a jury, by stipulation of the parties. The complaint alleges ownership in fee of the demanded premises by the plaintiff on the 1st day of July, 1886, and the wrongful and continued exclusion of him from them ever since by the defendants, to his damage of $10,000. The answers controvert all the allegations of the complaint, and also plead the statute of limitations in bar of the action. No testimony was offered in support of this plea, and it must therefore be considered as abandoned.

The plaintiff deraigns whatever title he possesses to the land by two patents of the United States, each for an undivided half of a tract known as the "Rancho Las Bolsas,"—one issued June 19, 1874, to Ramon Yorba and others; the other issued August 27, 1877, to Juan Jose Murillo and his wife. Both of these patents embrace the demanded premises. The defendants who have not disclaimed, or against whom the action has not been dismissed, were in possession of the premises at the commencement of the action, and claim title to them through a patent of the United States issued December 21, 1883, to Bernardino Yorba and others, for a tract known as the "Rancho Santiago de Santa Ana." This patent also embraces the demanded premises.

As the patents of both parties cover the land, the controversy can only be determined by reference to the concessions of the former government, or by the proceedings for their recognition and confirmation taken under our government. The patents are based upon the supposed validity of the asserted title or equity of the patentees when the jurisdiction of Mexico passed to the United States. Whoever previously possessed the better right to the possession of the lands would have been maintained by the government of that country in his claim against contestants, and those who have succeeded to that better right are entitled, under our government, to the like protection. The patents were not issued until those concessions had been recognized by the tribunals of the United States as genuine, and as conferring a right or equity upon the respective claimants, which was entitled to protection under the act of March 3, 1851. It was not the purpose of that act, or of the proceedings under it, to su-

persede rights or equities relating to lands conferred by the former government, but to confirm and perfect them by giving the holder such record or documentary evidence of their validity as would enable him to enforce them in the courts of the country. We must, therefore, look into the character of those concessions, and, if they furnish no solution of the matter in contention, we must consider the effect of proceedings had before the the tribunals of the United States upon their respective pretensions. *Henshaw* v. *Bissell*, 18 Wall. 255, 266. Nearly all the original documents issued by the former governments, or certified copies thereof, have been produced in evidence, as well as attempted translations of them. These translations, it is true, are in bad English, and are often inaccurate. We cannot, however, be misled by them, for we have the originals or copies to which we can refer to verify or correct them. Turning to those concessions, and looking first to those produced on behalf of the plaintiff in support of his contention, we find the facts to be substantially as follows:

In 1784 one Manuel Nieto, a subject of Spain, obtained from Pedro Fages, then military governor or comandante of California, under the Spanish crown, a concession of some kind relating to a large tract of land within the present county of Los Angeles, embracing about 33 square leagues. This concession is not in evidence, and we are only made acquainted with its character by references to it in other documents of admitted genuineness before us. It gave to Nieto permission to occupy the land, but from what subsequently took place it is evident that it did not purport to pass the title to him, although in proceedings before the land commission it is often spoken of as a grant, vesting the fee or ownership in him. Under the concession Nieto entered upon the land, and continued in its occupation until his death, in 1804. It would also seem from these documents that Nieto left surviving him four children,—Jose Antonio, Juan Jose, Manuela, and Antonio Maria,—who continued in possession of the land after his death; and that in 1832 two of these, Jose Antonio and Antonio Maria, died, leaving widows surviving them. In the following year, (1833,) on the 26th day of July, one Luciano Grijalva, representing the interests of Juan Jose Nieto, presented a petition to Jose Figueroa, then superior political chief of the territory of Upper California, in which he recited the concession of Governor Pedro Fages to Manuel Nieto, the latter's possession of the land, his death, and the subsequent uninterrupted occupation by his heirs, and prayed, in order that they might enjoy the favor conceded to their father, that separate titles be given to each of them for the several parts corresponding with those designated on an accompanying map, as follows: The tract of Santa Gertrudes to Dona Josefa Cota and her children, as widow of the deceased Antonia Maria Nieto; the tract of Las Bolsas to Dona Catarina Ruiz and her children, as the widow of the deceased Jose Antonio Nieto; the tract of Los Cerritos to Dona Manuela Nieto; and the remainder, which comprehended the tracts Los Coyotes, Alamitos, and Palo Alto, to Don Juan Jose Nieto, who, as head of the family, had determined upon this division for the benefit of its members. To avoid all ground of dis-

pute he asked that possession be given to each one of his or her portion thus designated. On the subsequent day, July 27, 1833, the political chief made a decree reciting the former concession by Governor Pedro Fages to Manuel Nieto, and the peaceable and uninterrupted possession by which he and his heirs had enjoyed the fruits of the lands, and declared them (the parties for whose benefit the petition was presented) owners in fee of the premises, designating the portion granted to each, namely: To Juan Jose Nieto the tracts called "Los Coyotes," "Alamitos," and "Palo Verde;" to Dona Manuela Nieto the tract called "Los Cerritos;" to Dona Josefa Cota, widow of Don Antonio Maria Nieto, the tract called "Santa Gertrudes;" to Dona Catarina Ruiz, the widow of Don Jose Antonio Nieto, the tract called "Las Bolsas." The governor also directed that titles for these several tracts should be issued to the parties, in order that juridical possession might be given to them. On the 22d of May, 1834, pursuant to this decree, formal grants were issued by him to the parties, to each one for his or her separate portion, and among them one to Dona Catarina Ruiz for the tract "known by the name of 'Las Bolsas,' bounded by the tracts of Los Alamitos and Los Coyotes, the river Santa Ana, and the coast;" he declaring, by virtue of the authority conferred upon him by the decree of the previous year, and in the name of the Mexican nation, "the ownership in fee" of the tract to be vested in her, and that she might be put in peaceable possession thereof. The fourth condition attached to the grant stated the land to be seven square leagues in extent, as shown on an accompanying map, and directed the judicial officer who should give the grantee possession to cause it to be measured, so as to point out its boundaries, the surplus to remain to the nation. In March, 1835, juridical possession of the land was given to her, after citation to the neighboring proprietors to be present at the proceeding; that is to say, the possession of the land was officially delivered to her, under the direction of a magistrate of the vicinage. A copy of the record of this proceeding is before us, and it shows that all the formalities required by the laws of Mexico were fully complied with. The proceeding involved a measurement of the land, the marking of its boundaries, and the putting of the grantee in possession. To the record a map of the land was attached.

As stated above, the plaintiff deraigned his title through two patents of the United States, each being for an undivided half of the tract known as "Las Bolsas." The first patent, bearing date on the 19th of June, 1874, was issued upon a final decree confirming the claim of Ramon Yorba and others, founded upon the grant of the Mexican government to Catarina Ruiz, issued, as mentioned above, on the 22d day of May, 1834. Their petition was presented to the land commission on the 20th of October, 1852. It traced the title of the claimants to Manuel Nieto, who, as averred, died in 1804 or 1805, "seised in fee as owner" of the tract of land situated in the county of Los Angeles, "bounded by the river San Gabriel, by the old road to Santa Ana, by the river Santa Ana, and by the coast;" that Nieto acquired his title to the land by grant from Governor Pedro Fages some time between the years 1784 and 1785,

which it was believed was subsequently ratified by the viceroy of New Spain; that four children survived him, who succeeded to his title and possession, and that after the death of two of them the land was divided by Governor Figueroa between the surviving sons and the widows of the deceased sons, and to them separate titles were issued for their respective portions; that to Catarina Ruiz the grant was issued for the tract called "Las Bolsas," and under her the claimants derived their title. It seems from the language of the petition that the claimants treated the concession to Nieto as a grant of title,—an instrument transferring the ownership of the lands to him; but, as already stated, the concession to him did not reach the title, and was only a permission to graze his cattle upon the tract mentioned. It may be doubted whether the political chief of the territory under the Spanish crown possessed any power to alienate the fee of any portion of the public domain. On this subject the land commission, which had occasion to examine the question when the title claimed under the concession to Manuel Nieto was before it, uses this language:

"The concessions under the Spanish authority, made in the Californias before the independence of Mexico, do not purport to be perfect titles; at least none of that character have fallen under the notice of the commission. One only has received confirmation, and that on the ground that an equitable, though not legal, title was established. The old grants were generally mere rights of possession or provisional, and, in almost every case, when the government was established after the Mexican revolution, the parties applied for new grants, which they received, not as a mere evidence of a former subsisting title, but in the form, and under the terms, and subject to the conditions, imposed by the law of 1824 and the regulations of 1828. Under these, the power of the governors over the public domain was defined. It was a power to grant under certain conditions, not a power to recognize and give new evidence of private titles already existing, without conditions or limitations. He had entire discretion as to choice of grantees, and this power enabled him to do most ample justice to persons who held under provisional grants previously issued, or who occupied without a shadow of title or right to the possession. All these presented themselves to the new authorities for concessions under the new order of things, and readily received grants for the ancient possession. The archives of this commission are full of such documents, and the custom was all but universal." Record in *U. S.* v. *Conception Nieto*, from land commission, in clerk's office of U. S. district court, No. 423.

Certain it is that Governor Figueroa, when he made the decree ordering grants to the heirs of Nieto on the 27th of July, 1833, and when he signed the formal grants to them on the 22d of May, 1834, did not consider that the concession to Manuel Nieto passed the ownership of the land. Had it done so, he would have had no power to make grants of the land to others, and to subject his grants to possible forfeitures for breach of conditions annexed. His action shows conclusively that he regarded the land as still part of the public domain of Mexico, to be disposed of under its colonization laws. The documentary evidence introduced before the land commission by the claimants, and upon which the decree of confirmation was made, consisted of the grant to Catarina Ruiz on the 22d of May, 1834, the record of the juridical possession given

to her, and instruments transferring her title to them. The claim was confirmed September 22, 1854, to the extent of the undivided three-fourths of the rancho. On appeal to the district court of the United States the decree was modified, and the confirmation limited to an undivided half of the rancho. Subsequently, on the 4th of March, 1858, the government waived its appeal from the decree of the district court, which thereupon became final. The boundaries given in the decree and recited in the patent are as follows:

"The lands of which confirmation is hereby made are one undivided half of the tract called 'Las Bolsas,' situated in the county of Los Angeles, said tract of Las Bolsas being a part of the lands originally granted to Manuel Nieto by Governor Pedro Fages, in or about the year 1784, and which said grant was recognized and confirmed by the decree of date July 27, 1833, made by Governor Jose Figueroa in the petition of Luciano Grijalva, presented on behalf of the heirs of the said Manuel Nieto; and by the grant of date May 22, 1834, issued by said Governor Figueroa to Catarina Ruiz, widow of Jose Antonio Nieto, a son of said Manuel Nieto; reference for the boundaries for the tract of Las Bolsas being had to the said petition of Luciano Grijalva, and to the map accompanying the same, contained in the *expediente* filed in this case, to-wit: On the south, the sea; on the west, the lands called 'Los Alamitos;' on the north, the lands called 'Los Coyotes' and the tract solicited by Don Patricio Ontiveras; and on the east, the Rio de Santa Ana, as the same ran at the date of said petition."

The claim to the other undivided half of the Rancho Las Bolsas was presented to the land commission by Maria Cleofa Nieto Murillo and her husband on the 6th day of November, 1852. It was rejected by the board, because the claimants failed to connect themselves with the grant to Catarina Ruiz, but upon appeal to the district court this decree was reversed, and the undivided half of the land was confirmed to the claimants. The decree recites:

"Reference for boundaries of said tract of the 'Las Bolsas' being had to the said petition of Luciano Grijalva and to the map accompanying the same, contained in the *expediente* filed in this case, to-wit: On the south by the sea, on the west by the land called 'Los Coyotes' and the tract solicited by Don Patricio Ontiveras, and on the east by the river Santa Ana, as the same ran at the date of the petition."

A survey of the land, confirmed by the decree in favor of Ramon Yorba, was made in 1858, under the direction of the United States surveyor general, and on the 16th of April, 1861, was ordered into the United States district court for review, under the act of June 14, 1860. Exceptions were filed to the survey, which affected the boundary on the west side, but did not affect the line along the east, along the river and its old bed, which is the line in dispute in this case. The exceptions to the western line were sustained, but no change was made on the eastern line; and, in accordance with the direction of the district court, a modified survey of the land was made and returned into the court, which was finally approved February 6, 1874. Upon this approved survey the patent to Yorba of the undivided half of the rancho was issued. The rancho, under the confirmation to the Murillos, was again surveyed under the direction of the surveyor general of the United States for Cali-

fornia, in December, 1868, and was approved by him April 3, 1877, and by the commissioner of the general land-office, August 27, 1877, and upon it the patent to them was issued.

It is plain from this brief statement that on the 22d of May, 1834, the title passed from the Mexican government to Catarina Ruiz by the grant of Governor Figueroa, and by the juridical proceedings which followed in 1835 she was placed in possession of the premises granted. Her estate in the lands thus became perfect, subject only to the possibility of its becoming divested by the subsequent refusal of the departmental assembly to give its approval to the grant. The regulations of Mexico of 1828 for the colonization of the territories of the republic provided that grants of land by the governors thereof to families or private persons should not be held to be "definitively valid" without the previous approval of the departmental assembly, to which the documents relating to such grants were to be forwarded. But this provision did not prevent the title from passing by the grant of the governor. As said by the supreme court of the United States in *Hornsby* v. *U. S.*, 10 Wall. 238:

"Such approval was not a condition precedent to the vesting of the title. According to the regulations of 1828 the authority to make grants of land in California was lodged solely with the governor. It was not shared by him with the assembly. That body only possessed the power to approve or disapprove of grants made by him. Until such approval the estate granted was subject to be defeated. With such approval the grant became, as it was termed in the regulations, 'definitively valid;' that is, it ceased to be defeasible, and the estate was no longer liable to be divested, except by proceedings for breach of its other conditions. Besides, it was the duty of the governor, and not of the grantee, to submit to the assembly grants issued by him for their approbation. His neglect in this respect suspended the definitive validity, as it was termed, of the grant: that is, it prolonged the liability of the estate to be defeated by the action of the assembly and of the supreme government thereon, to which the matter was referred in case the approval of the assembly was not obtained; and no other consequence followed. His neglect was not permitted to operate to divest the grantees of the estate already vested in them. In many instances years elapsed before the approval was obtained, although the grantees were in the mean time in the possession and enjoyment of the property, and in many instances no approval was had previous to the conquest."

No action was taken to divest the estate of the grantee under the former government, because her grant was not then approved, and the power of the departmental assembly of course ceased with the cession of the country. When, therefore, jurisdiction passed from Mexico to the United States, Catarina Ruiz was invested with full ownership of the land. She had an absolute title in fee to the entire tract described and measured off in the proceedings giving her official possession of the property. Her interest in one undivided half of the premises having afterwards passed to Yorba and others, and in the other undivided half to the Murillos, and their claims having been presented to and confirmed by the board of land commissioners appointed by the United States to ascertain and settle private land claims in California, and their decrees of confirmation having become final by the dismissals of the appeals

therefrom by the attorney general, and the surveys of the lands confirmed having been approved, all controversy between those claimants and the United States respecting their title to those lands, and the extent and boundaries thereof, was closed. The decrees were conclusive as to the character of the title, not only against the United States, but also against all persons claiming under them by proceedings subsequent; and the patents of the United States issued thereon were a relinquishment of all claims or right in the lands or power over them, if any then existed. Only prior and superior rights of others remained unaffected. Unless, therefore, the defendants can show that by virtue of the concession made to the parties through whom they claim under the former government, or by virtue of the proceedings before the land commission, and of the patents of the United States issued upon its decree, they acquired a right and title to the demanded premises prior and superior to that conferred by the grant of Figueroa to Ruiz on the 22d day of May, 1834, the plaintiff must be adjudged entitled to recover. What, then, was the right or title, if any, acquired by those defendants under the former government? To answer this question we turn to the documents produced by them. The first of these is a petition of one Manuel Rodriguez, dated September 11, 1801, to Arrillaga, then governor of the territory, stating that in view of the repeated petitions through him to that officer in behalf of Lieut. Don Pablo Grijalva for a place upon which to put his stock and build a house and *corral*, and in view of the power by the governor conferred upon him of passing upon the petitions, he had pointed out to Grijalva the place Arroyo de Santiago, lying midway between the Missions San Juan Capistrano and San Gabriel, about nine leagues from each, stating that there was not within a great distance any rancheria of natives, and that neither of the missions claimed any right to it. The petitioner added that, should the governor make the concession desired, Grijalva might put upon the place a great number of cattle which he had in the immediate neighborhood of Manuel Nieto, and concluded with the expression of a hope that the governor would order a title to issue to Grijalva for the possession of the place within certain distances specified. To this petition the governor, on the 19th of October, 1801, replied, stating that Grijalva should apply to him (Rodriguez) for the place, setting forth its actual condition and the extent of land he desired, and that thereupon notice should be given to the adjoining proprietors to ascertain whether any damage would result to them by the concession asked; and that, this being done, and no objection to the concession being made, he could issue a decree setting forth the fact that there was no objection, and order him to be placed in possession, he forwarding everything to the government for its approval and the issue of a title, adding that this was the way this kind of business was done for those to whom royal lands were given, though he did not know whether the government had made any new provision on this subject. Grijalva, accordingly, on the 8th day of December, 1801, made application to Rodriguez for the place Arroyo de Santiago, in order to put his cattle and horses thereon, stating that the place was situated eight leagues from the Mission San Juan Capistrano,

and from nine to ten from the Mission of San Gabriel. He also stated the extent of the land he desired. On the 14th of December following, Rodriguez directed that notice of the application of Grijalva be given to the fathers of the Missions San Juan Capistrano and San Gabriel, and to Manuel Nieto, in order to ascertain whether they would be prejudiced by granting his petition. The priest of the Mission of San Juan Capistrano returned that, so long as the applicant did not go beyond the boundaries of the land he asked, the concession would not prejudice the mission. It does not appear that any response was obtained from the priests of the Mission of San Gabriel, or that any grant was made upon the petition, or that any further action was had upon it.

It appears, however, that in 1809 one Antonio Yorba claimed that he had been a partner with Grijalva, and was interested with him in his application for the place upon which to put stock and build a house. In November of that year he accordingly presented, through his son, a petition to the governor of the territory referring to the petition of Grijalva, and stating that he had heard that Grijalva, who had since died, had not inserted his name in the application, notwithstanding their partnership: that since Grijalva's death he had agreed with one Juan Peralta to live upon the place, and, with one of the sons of the petitioner, take care of the cattle and horses that were upon it, being about 300 head of each kind. In consideration of these facts, and the large family he had, he requested the governor to make a concession of the place of Santiago to him, that the neighbors of Peralta and himself might be profitable to both. This petition the governor forwarded to Lieut. Don Francisco Maria Ruiz, at San Diego, who, on the 20th day of April, 1810, reported that the petition of Grijalva could not be found in the archives of the presidio there, and that he had inquired for it without success of the widow of Grijalva; that she stated that she had heard her deceased husband say he had presented it in his own name; but, notwithstanding, it was her wish that Antonio Yorba, with his children and her nephew, one Pablo Peralta, should remain on the rancho, in order that they might take care of the stock and crops for the support of their families. On this report the governor made an order on the 1st day of July, 1810, in which he stated that there was no objection on his part to the concession solicited, upon the terms expressed by the petitioner, and for that purpose he directed that the commandant of the presidio of San Diego should take the necessary steps to notify the adjoining land-owners to ascertain whether or not the concession would be detrimental to them, and, in case no detriment would result to them, that the petitioner should be placed in possession. No further proceedings appear to have been had upon this application. It is not shown that any notification to the adjoining proprietors was made, or that any information was obtained of their opinion whether such a concession would be detrimental to them or not. So far as the evidence before us discloses, the efforts of the petitioner ended with this report, and no further action upon it was taken by the governor of the territory. It is too plain for argument that no title passed from the governor by virtue of the documents produced. It is true the

petitioner was subsequently in possession of the premises, but he does not produce, nor is there found anywhere in the archives, any documents showing that any authority was given for him to occupy them. But, even if the possession was taken by permission of the governor or other authorities, no inference of a grant of title can be drawn from it. Some formal proceedings were necessary under the Spanish government to pass title to any portion of the public domain out of the crown to the subject. The population at that time in the country was very sparse, and there were vast quantities of vacant land. Where one occupied such land for his cattle, very little complaint was likely to be made touching his authority; but, be that as it may, nothing is shown by the documents conferring even an equitable right upon the petitioner Yorba, or upon Peralta. It is plain, therefore, that neither of those parties, or any parties claiming through them, had any interest in the property in controversy under the former government which would have given them a standing in a court of justice to call in question the right of Catarina Ruiz by her grant of May 22, 1834. Their interest was, at best, only such an equity as arises in favor of parties who had long been in the occupation of public land, with the silent acquiescence of the government, from the possible improvement they may have made upon it. To such parties the government might well have extended a preference in the purchase or donation of the lands when it concluded to dispose of them. But mere possession of any portion of the public domain, under an instrument which did not purport to transfer the property, did not create, under the Spanish law, a title in the possessor which would enable him to hold the property against the crown; nor did such possession, however long continued, create any title against the Mexican government. *Nieto* v. *Carpenter*, 21 Cal. 455, 489. It follows that whatever title the heirs of Yorba and Peralta possessed in the lands in controversy, which passed to the defendants, was acquired by their proceedings before the board of land commissioners, and the patent of the United States issued upon its decree. The petition of the heirs to the board set forth that they claimed in fee-simple the tract of land known by the name of "Santiago," containing about 10 square leagues, by virtue of a concession to their ancestors by Arrillaga, governor of California, bearing date of July 1, 1810. The concession thus alleged was no other than the order of that date upon which we have already commented, and which did not, in itself, convey any interest in the lands solicited, and was not followed by any proceeding which purported to have that effect, even if it were clear that governors of the province under the Spanish crown possessed any authority to alienate portions of the public domain. The board of commissioners treated the document, however, as a grant of the land, or at least as creating, in connection with the possession of their ancestors, an equitable right to it, and accordingly, by its decree of July 10, 1855, confirmed their claim. An appeal to the district court of the United States was, on the 8th day of June, 1857, dismissed, the government suggesting that it did not intend to further prosecute it, and the decree of the board thus became final. The decree did not, however, change the character

of the title of the claimants; it simply determined that it was valid, and entitled to recognition and perfection by a survey and patent. When the latter was afterwards issued, on the 21st day of December, 1883, whatever title to the land was in the United States passed to the patentees; but, if no title was then in them, none, of course, passed. That none was in them at that date is clear from what has already been said with respect to the title of the Las Bolsas, claimed under the grant of Catarina Ruiz. The claim of Ramon Yorba and others to an undivided half of that rancho having been finally confirmed, the survey of that land having been made and approved, and a patent for such undivided half having been issued to the claimants on the 19th day of June, 1874, and the claim of the Murillos to the other undivided half also having been finally confirmed, and the same having also been approved, and a patent for that undivided half having been issued to the claimants on the 27th day of August, 1877, there was no interest or title in the premises surveyed and patented remaining in the United States which they could convey by any subsequent patent. However conclusive against the United States, and parties claiming under them by title subsequent, a patent may be, it in no respect impairs the right of a previous patentee to contest the title upon which the subsequent patent has been issued for the same premises. Every patent issued upon a confirmed claim under the act of March 3, 1851, in terms declares that it shall not affect the rights of third parties; that is, those who have a standing to contest the pretensions of the patentee had no patent been issued.

It follows that the question as to the correctness of the survey of the Bolsas tract, approved by the United States district court and by the officers of the land department, which was much discussed by counsel, is of no practical consequence in the case. The patents under which the plaintiff claims, covering the premises in controversy, passed all the title which the United States then possessed therein; and, until those patents are set aside, the subsequent patent under which the defendants claim can pass no title which can be considered in this action. The issues in the case will therefore be found for the plaintiff, and judgment for the possession of the demanded premises entered thereon, with costs.

FISHER *et al. v.* MOOG *et al.*[1]

(*Circuit Court, S. D. Alabama.* August 28, 1889.)

1. FRAUDULENT CONVEYANCES—ACTIONS TO SET ASIDE—BURDEN OF PROOF.
Where the allegation of the complaint in a suit to set aside conveyances as in fraud of creditors, that the grantor is and was at the time of the conveyances indebted to complainants, is not denied, the burden of showing a consideration, not materially inadequate, is on the grantees.
2. SAME—TRANSACTIONS BETWEEN RELATIONS.
Where such grantees are the half-brother and the son-in-law of the grantor, a clearer, fuller measure of proof is required than if the transactions had been between strangers.
3. SAME.
In such case, where the only evidence on which defendants' witnesses are agreed is that the consideration mentioned in the deeds, *i. e.*, a precedent indebtedness, is the true one, and that the grantor has retained control of the property ever since the execution of the deeds, and the evidence as to when, where, and how the indebtedness was created is irreconcilably inconsistent and conflicting, it is insufficient to show that defendants were *bona fide* purchasers.
4. SAME—ESTOPPEL.
As defendants claim under a deed from the debtor, they are estopped to deny his title and to allege that complainants were thus not injured by the conveyances.
5. SAME—PLEADING—EQUITY.
The bill charged that a conveyance to one of the defendants for a recited consideration of a certain sum was made to defraud creditors; that the grantor did not owe such sum, or near it; and that the defendant held the property as security or for the benefit of the grantor, and prayed that the conveyance be set aside, the property sold, and out of the proceeds the defendant's claim be paid and the balance applied on complainants' debts, or, if the conveyance was voluntary, that it might be declared void and the entire proceeds applied to complainants' debts. *Held* that relief might be granted under either the special or general prayer, as, though such special prayer was in the alternative, it was certain in its terms.
6. EQUITY PLEADING—WAIVER OF OATH.
Where an original bill, by its foot-note, waives oath as to all defendants, and another defendant is brought in by amendment, and instead of a new foot-note the original foot-note is amended by naming him as defendant, his oath is waived.

In Equity.

Bill by Fisher, Parker & Co. and others to set aside two conveyances made by Bernard Moog, one to his half-brother Aaron Moog and one to his son-in-law Isadore Strauss, as made in fraud of creditors.

Overall & Bestor and *Pillans, Torrey & Hanaw*, for complainants.

G. L. & H. T. Smith, *R. H. Clarke*, and *G. B. Clark*, for sundry defendants.

TOULMIN, J. A conveyance of property as against the existing creditors of the grantor cannot be supported unless shown to have been founded on an adequate and valuable consideration, and when between

[1] Reported by P. J. Hamilton, of the Mobile, Ala., bar.

the grantee and an existing creditor a controversy arises as to the validity of the conveyance, the *onus* of proving that it was founded on an adequate and valuable consideration is cast on the grantee. The recital of a consideration in the conveyance is not evidence against the creditor. *Hubbard* v. *Allen*, 59 Ala. 283; *Harrell* v. *Mitchell*, 61 Ala. 270; *Zelnicker* v. *Brigham*, 74 Ala. 598; *Buchanan* v. *Buchanan*, 72 Ala. 55; *Owens* v. *Hobbie*, 82 Ala. 466, 3 South. Rep. 145; *Wedgworth* v. *Wedgworth*, 84 Ala. 274, 4 South. Rep. 149; *Walton* v. *Atkinson*, 84 Ala. 592, 4 South. Rep. 681. The relationship of the grantor and grantee, the pendency or apprehension of suits on pecuniary debts or liabilities then existing, are circumstances from which unfavorable presumptions are drawn, and which call for evidence of a full and valuable consideration, and the burden rests on the grantee to repel these presumptions, and the sufficiency of the proof of a consideration must depend on the relations existing between the parties, the circumstances surrounding them when the transaction was entered into, and their subsequent conduct in reference to it. Clearer and more convincing proof will be required if these are calculated to excite a just suspicion of the fairness of the transaction. Say the courts:

"Transactions between parties nearly related by affinity or consanguinity are jealously watched in a court of equity, and should be closely scrutinized. Whenever such relationship exists, and the rights of creditors are involved, clearer, fuller proof must be given of an adequate and valuable consideration and of the good faith of the grantee than would be required of a stranger." Authorities cited *supra*, and Bump, Fraud. Conv. 54; *Lipscomb* v. *McClellan*, 72 Ala. 151; *Gordon* v. *McIlwain*, 82 Ala. 251, 2 South. Rep. 671; *Pollak* v. *Searcy*, 84 Ala. 259, 4 South. Rep. 137.

There is in this case no denial of the fact that Bernard Moog was and is indebted to the complainants, as is set out in the bill of complaint; nor is it denied that such indebtedness existed before and at the time he made the conveyances to his half-brother Aaron Moog and to his son-in-law Isadore Strauss, whose validity is assailed in the bill. It is shown, then, that the complainants are creditors who could be hindered or delayed by said conveyances. These undisputed facts place on said Aaron Moog and Isadore Strauss the burden of proving a consideration for their deeds, and not materially disproportionate to the value of the land conveyed to them, and, the conveyances being from the half-brother in the one instance and the father-in-law in the other, a clearer and fuller measure of proof is required than if the transactions had been between strangers. The consideration attempted to be proved in support of the conveyances in question is not the payment of money to the grantor, but the extinguishment of an indebtedness owing by him as surviving partner of A. & B. Moog to the grantees.

Counsel for defendant Aaron Moog contends that, as his answer which denies the allegations of the bill is sworn to, it is evidence, and can only be overcome by the testimony of two witnesses, or that of one witness with corroborating circumstances, and that as no such proof has been made by complainants the bill must be dismissed as to him. Aaron

Moog is made a defendant by an amendment to the original bill, and the contention is that there is no foot-note to the amendment waiving oath to his answer. The original bill, in its foot-note, waived oath as to all defendants, and in the amendment which brought in Aaron Moog, instead of a new foot-note, the foot-note to the original bill was amended by naming him as one of the defendants, and stating what part of the bill he was required to answer. So the amended foot-note covered him, and his answer is not evidence, oath thereto having been waived. An amendment of a bill, when properly allowed, takes effect as of the filing of the original bill, (*Jones* v. *McPhillips*, 82 Ala. 102, 2 South. Rep. 468; 1 Brick. Dig. p. 705, § 953;) and the foot-note is a part of the bill, and any alteration in or addition to such note after the bill is filed shall be treated as an amendment to the bill, (Amended Rules 41, 42, Equity Rules of United States Circuit Court.)

Again, it is contended in argument by counsel for defendants that the title to the property conveyed to Aaron Moog, and a part of that conveyed to Isadore Strauss by Bernard Moog, as appears from deeds attached to Strauss' deposition, stood in the name of A. & B. Moog, and some part of it in the name of A. Moog, and that as it does not appear from the evidence that the partnership debts of A. & B. Moog have been paid, such property is not subject to B. Moog's debts, and no injury, therefore, is shown by complainants; that fraud and injury must concur to entitle complainants to relief. It appears that A. & B. Moog was a partnership, which was dissolved by the death of A. Moog about a year before B. Moog failed in business, and made the conveyances to Aaron Moog and Isadore Strauss. The bill is filed to set aside these conveyances, on the alleged ground that they were made to hinder, delay, and defraud his creditors. The answers do not set up any want of title in B. Moog, or that there were any partnership debts of A. & B. Moog other than those of said Aaron Moog and Isadore Strauss. Can an issue be raised in argument that is not presented by the pleadings? There is, however, oral proof in the cause that B. Moog acquired the title of A. Moog to said property by will. It is true, it is not competent to prove wills in this way, but no objection was made to this oral proof, (testimony of Isadore Strauss.) But are not Aaron Moog and Isadore Strauss estopped from denying or raising any question as to B. Moog's title? It is under the deed of B. Moog and wife that they claim to hold the property. It is his title that they have. It is his title that complainants seek to subject to their debts, and to do so they ask that his conveyances be set aside. If the complainants have otherwise made out their case, they are, in my opinion, entitled to condemn, to the satisfaction of their debts, whatever of interest or title B. Moog had in the property so conveyed. Both conveyances were executed on January 10, 1885.

The defendants' counsel further contends that "on account of the nature of the special prayer" of the bill no relief can be granted against Isadore Strauss under it; that it is in the alternative and uncertain in its terms; and that under the general prayer no relief can be granted, because it would be repugnant to and inconsistent with the special prayer.

The special prayer is in the alternative, but it is, under the allegations of the bill, certain in its terms. But if it were so uncertain that no relief could be granted under it, I think the prayer for general relief is sufficient to entitle the complainants on the hearing to such relief as the facts of the case may require. 1 Brick. Dig. p. 704, § 928. It is true that under the general prayer no relief can be granted which is distinct from and independent of that specially prayed for, except when the bill is filed in a double aspect. 1 Brick. Dig. p. 704, §§ 938, 939. But it is certainly permissible for a complainant to aver in his bill that either one or the other of two alternative statements is true. *Shields* v. *Barrow*, 17 How. 130–144; Story, Eq. Pl. § 254; *Thomason* v. *Smithson*, 7 Port. (Ala.) 144; *Strange* v. *Watson*, 11 Ala. 324; *Simmons* v. *Williams*, 27 Ala. 507. The bill in this case contains such alternative statements. The bill charges that the conveyance to Isadore Strauss for the recited consideration of $3,093 was fictitious and simulated, and was made to hinder, delay, and defraud the creditors of B. Moog. It also charges that Moog did not owe said sum, or anything near it, and that Strauss holds the property as a security for his debt, or for the benefit of Moog, having acquired it without consideration, and, whichever it may be, the special prayer is that the conveyance be set aside, and that the property be sold by decree of the court, and out of the proceeds to pay said Strauss anything which really may be due him, if anything, and the balance to be applied on the debts of complainants; or, if said conveyance be found entirely without consideration, but fictitious and simulated, that the same may be declared fraudulent and void, and the whole of the proceeds of said sale may be applied to the debts of complainants. My opinion is that relief may be granted complainants under either the special or general prayer.

1. Has Aaron Moog proved the consideration of the deed to him with that measure of proof which is required in such cases? His witnesses are himself, said Bernard Moog, and said Isadore Strauss. All of them testify that the consideration of the deed to him was an indebtedness of A. & B. Moog to him of $7,500, with interest from January 5, 1883, which they say was evidenced by a due-bill of $7,500 of that date, and which Aaron says he surrendered to Bernard at the time the deed was made to him. There are, however, many inconsistencies and irreconcilable statements and circumstances connected with Aaron Moog's claim. He testifies that the money was given to A. & B. Moog from time to time, and that he entered an account of the several sums so given them in his own ledger up to 1880, and that they were charged to his individual account in his firm (Moog & Weil) books; that they were doing a grocery business in Mobile at the time. He says he kept no account of moneys he let A. & B. Moog have after that time but what he kept in a pocket memorandum book, which he exhibits and offers in evidence; says he made each of the entries in it at the date he let them have the several sums of money. The books of Moog & Weil were not produced. But the memorandum book shows these entries written in pencil, and fresh in appearance, viz.:

1878.	A. & B. Moog.	
Dec. 3.	Cash,	425 00
3.		1,553 10
4.		360 69
4.		184 20
1879.		
Jan. 1.		949 00
10.		100 00
10.		125 00
Oct. 25.		125 00
Aug. 4-80.		665 19
Jan. 5-83.	Interest,	975 00
	Cash same day,	2,221 57
	Total,	7,500 00

Due-bill for it.

An addition of the several items of cash as shown by this book, with the interest as charged therein, aggregates $7,684.35, and not $7,500, and if interest was calculated on each item of cash from the date it is claimed to have been loaned it would, with the principal, amount to more than $8,000. He says he had no arrangement about the interest A. & B. Moog were to pay. The deed recites the indebtedness paid thereby as a certain due-bill made by the former firm of A. & B. Moog on the 5th January, 1883, for $7,500, with interest from date. Aaron says he knew B. Moog was sued in a number of cases at the time he got the deed. He further testifies that he was in business in Montgomery, Ala., and failed there in 1874 or 1875, and settled with his creditors at 40 cents on the dollar. He again went in business there, and continued for about a year; then came to Mobile in 1876, or 1877, and went in business with Weil in 1877 or 1878. They had a capital of $3,000 to $5,000. Yet he was able to take out of this business on his individual account, according to his statement, in December, 1878, and in January, 1879, as much as $3,697.59, to loan to A. & B. Moog. It will be observed that there is but one item of cash charged on his memorandum book subsequent to August, 1880, and that was on January 5, 1883, and Aaron says the money came out of his business. Aaron further testifies that his brother Bernard has had control of the property and rented it; that Bernard collected the rent for him on a part of the property, and always turned it over to him and accounted for it; that he knew the property was insured, but did not know in what company it was insured, the amount of insurance, or the amount of premium paid; that Bernard paid the expenses and accounted to him for balance of rent. He could not say exactly when he received the last rent, or how much rent he had received altogether from the property. He never saw the notes the tenant gave for the rent. His brother got them, collected them, and settled with him. The other property covered by his deed was under a prior mortgage to the Mobile Savings Bank, and from this he got no rent. It was managed by the bank, and he had nothing to do with it. Bernard Moog testifies that he owed Aaron Moog on Janu-

ary 10, 1885, $7,500, due-bill for money borrowed from him by A. & B. Moog in 1882 and 1883, as they would need it. He says that the conveyances to him and Isadore Strauss "were made by A. & B. Moog's books. We looked at A. & B. Moog's books." This is all of his testimony on that subject. He says, however, that Aaron Moog has never got any benefit from the property; that he (Bernard) collected some rent at one time. He was hard up and collected two months' rent, and gave it to his son; collected it for Aaron Moog, and Aaron allowed him to use it, and he gave it to his son. He says this was the property covered by the mortgage to the bank, and that he collected this rent with the consent of the bank. He says nothing about the other property included in the deed to Aaron. Isadore Strauss testifies that A. & B. Moog owed Aaron Moog $7,500 money, which he deposited with them in 1883. He was book-keeper for A. & B. Moog at that time. He says Aaron brought the money with him from Montgomery.

2. Has Isadore Strauss proved the consideration of the deed to him by that clear and convincing proof required against creditors whose debts and rights are established? Bernard Moog testifies that the conveyance was to pay an indebtedness to Strauss of "thirty-one hundred and some odd dollars," which A. & B. Moog owed him and which arose in this way: That Strauss was their book-keeper, and got a salary of $150 a month, and whenever he had money he would loan it to A. & B. Moog as they would need it; that when he would have $100 he would let them have it and give himself credit for it; that it appears from A. & B. Moog's books of the property he conveyed to Strauss one piece was a brick house, and he believes he gave him two-fifths of this; that Strauss subsequently sold and conveyed this house to his (Bernard Moog's) wife; that she paid him mostly in cash, and gave him her note for $530, which she paid last summer to her daughter, Strauss' wife. He further testifies that he has managed and controlled the property conveyed to Strauss; that the state and county taxes have not been paid on it, and the city taxes were only paid by him a short time ago. The house was partially burned a few months ago, and when he undertook to collect the insurance money a garnishment was levied on it for the city taxes, and he had to pay them before he could get any of the money. Isadore Strauss, in his answer, says that he loaned A. & B. Moog $1,800 in December, 1875; that the interest to January 10, 1885, was $1,310, and their indebtedness to him on that day was $3,110, which was the consideration for the deed of that date; that they owed him about $2,800 for unpaid salary for services for several years. But he claims nothing on account of salary so due him. In his deposition he says that they owed him $3,114 for money loaned, including interest on same; that on December 10, 1875, he loaned them $1,810, for which they agreed to pay him 8 per cent. interest per annum. This was the only cash loaned them. He testifies that A. & B. Moog owe him a small amount for salary, which was not settled by the conveyance. He does not exactly remember how much they owe him. He further testifies that he brought the money he loaned them with him from Montgomery, whence he came in 1875, and at the

time he was employed by them. He was then 18 years of age. He says he received a salary of $100 a month, and latterly $125 a month; that in 1881 he married Bernard Moog's daughter, rented a house at $18 a month, and lived economically. Just after said Moog's failure in 1885 he removed from Mobile to Texas, where he now resides. He testifies that Bernard Moog has had charge and control of the property conveyed to him; collected the rents, paid the insurance and taxes out of the rents, and remitted the balance to him. He says the taxes were paid out of the rents. He further testifies that he sold the two-fifths interest in the brick house to the wife of Bernard Moog for $1,200. The money was paid partly in cash and partly in board due her for his family; that no part of it was on time. Six hundred and twenty dollars was paid cash, and the balance was due for board. The books of A. & B. Moog having been produced on an order of the court, on examination of such parts of them as were introduced in evidence, they show no credits to Aaron Moog of the amounts or dates as testified to by either of the witnesses. They do show that at the time these witnesses say A. & B. Moog owed Aaron Moog a large amount of money the latter's firm of Moog & Weil were borrowing money from A. & B. Moog. So far as the books in evidence show, Aaron Moog's name appears but once in full on them, and that account shows debits and credits, including both cash and merchandise. Under date of April 2, 1880, it shows a balance due him of $2,606.26. Subsequent to this we find many transactions with and loans to "A. Moog" and to "A. M." But Aaron says he was not the man; that there is another A. Moog, who lives in Montgomery, and it must have been him. The books produced, however, show no such transactions either with Aaron Moog or Isadore Strauss as the witnesses have testified to, although B. Moog says the conveyances were made by and out of A. & B. Moog's books. It will be observed that Aaron Moog claims to have loaned A. & B. Moog large sums of money at different times during a period of three or four years without any arrangement with them about paying interest, and without ever charging any interest on such loans until after the expiration of four years from the first loan and about two and a half years from the last, when it is claimed a due-bill was given for the amount. But it does not appear from what time the interest was calculated, or on what particular sum or sums, or the rate charged. It will be observed that at the time he claims to have been lending money to A. & B. Moog the latter were lending money to his firm of Moog & Weil, and also to "A. Moog" and to "A. M." (The last may have been the A. Moog at Montgomery.) It will further be observed that the evidence as to the time the money was loaned by Aaron to A. & B. Moog, and where he got it, and of the circumstances under which it was loaned, is inconsistent and conflicting. The same observations may be made in regard to the claim of Isadore Strauss. Among other things it appears that during the nine years A. & B. Moog had his money they never paid him any interest on it, and it does not appear that he was ever credited with it on their books, although he says they agreed to pay him 8 per cent. interest per annum.

There are two material facts in this case on which the witnesses for the defense are agreed, namely, that the consideration recited in the deeds is the true consideration for them, and that Bernard Moog has had charge and control of the property covered by the deeds ever since their execution. On all other material points there is a hopeless inconsistency in the testimony. The irreconcilable inconsistencies and conflicts which appear in the evidence "materially impair the weight of the evidence as to the existence and validity of the indebtedness" claimed by these defendants. As was said by the court in one of the Alabama cases cited:

"The money may have been really loaned; we will not say it was not, but, when the connection between the parties and all the circumstances are considered, the *bona fides* of the consideration of the sale should be shown by clearer and more convincing proof against creditors whose debts and rights are established."

The circumstances shown "intensify the equitable rule that in transactions such as these between near relations fuller and more convincing proof of consideration and good faith must be made than if it had been between strangers."

I think the evidence in this case too unsatisfactory to establish the fact of *bona fide* purchases. The motion to dismiss the bill is denied, and a decree will be rendered granting to the complainants the relief they pray,—to have the conveyances to defendants Aaron Moog and Isadore Strauss set aside as fraudulent and void, and to have the interest of Bernard Moog in the property therein described sold for the satisfaction of complainants' debts.

The clerk will take an account and report to the court the amounts due the complainants, respectively, with interest computed to the coming in of the report.

BROUGHTON *v.* MCGREW.

(*Circuit Court, D. Indiana.* June 9, 1889.)

1. LIBEL AND SLANDER—WORDS ACTIONABLE PER SE.
   In order that a charge of drunkenness may be actionable it is necessary to couple it with some business in which drunkenness is a disqualification.
2. SAME—BURDEN OF PROOF.
   In actions for slander the burden of proof is upon the plaintiff to show that the essential words were uttered as averred in the complaint.
3. SAME—PRESUMPTION.
   Plaintiff need not, in the first instance, offer proof that the words, if uttered, were false, but may rely upon the presumption of his good character.
4. SAME—MALICE.
   Where the words are shown to have been uttered without justification malice is inferred.
5. SAME—PRIVILEGED COMMUNICATIONS.
   Statements made before a meeting of the stockholders of a railroad company by a member, attributing drunkenness and incapacity to one of the officials, are privileged if made in good faith.

6. SAME.
The fact that attorneys of the company, not stockholders, were present at the meeting, at the request of the president and some of the stockholders, does not take away the privilege.

7. SAME.
But if such words were spoken to the attorneys, or to other persons not entitled to hear them, and were not addressed to the stockholders' meeting, they are actionable.

8. SAME.
The question whether the charge was uttered to influence the election of directors is immaterial.

9. SAME—REPETITION OF SLANDER.
Words repeated to persons who have previously heard them under circumstances making them privileged are not actionable.

10. SAME—DAMAGES.
Compensatory damages only may be assessed unless there is such clear want of ground for uttering the words as warrants an inference of ill-will or hatred.

11. SAME.
The circumstances under which the words were spoken, the persons to whom spoken, the character of the person making the charge, and the injury to the character of the person assailed, together with the effect upon his business, are the elements to be considered in assessing damages.

At Law. Action for slander by Frederick Broughton against William McGrew.

James S. Frazer, *Robert C. Bell*, and *Samuel L. Morris*, for plaintiff.

R. S. Taylor, for defendant.

WOODS, J., (*charging jury.*) The action is by the plaintiff, Broughton, against the defendant, McGrew, for slander. It is charged in substance that the plaintiff was an employe of the Chicago & Atlantic Railroad, as general manager and assistant vice-president, and that the defendant, intending to injure him in that employment, maliciously uttered of him certain slanderous words. Omitting the explanatory phrases in the pleadings, and reading directly, it is charged that the defendant said of the plaintiff: "He has been drunk frequently, and you can't expect his subordinates to remain sober when he furnishes them such an example." That is one set of words. Another set: "He went over the road in his car, and there are people here who can tell you what condition he was in. I think the road-master was with him, but I am not sure. He was drunk, and staggered. He has been drunk in his office, and damning the patrons of the road." These are the words charged in the first paragraph of the complaint. In the second paragraph of the complaint, after reciting the employment of the plaintiff, it is charged that the defendant spoke of him these words: "It is generally reported that Broughton is under the influence of liquor half his time. I am reliably informed that he is unfit to do business." These last words, in themselves, contain nothing actionable. They have significance only in connection with the previous words, which are the gist of this paragraph of the complaint, namely, "that Broughton is under the influence of liquor half his time." That is the essence of the charge in this count.

Now, it is not actionable, or slanderous, in the sense of the law, to

charge a man generally with being drunk, or being in the habit of getting drunk, or having been drunk. In order that such a charge be actionable it is necessary to couple it with some business in which drunkenness is a disqualification, or tends to constitute incapacity; that is to say, some business in respect to which the charge of drunkenness would tend to injure the party.

The burden of proof is upon the plaintiff to make out his case as he has alleged it to be. He must show that the defendant spoke of him in relation to his employment in the management of the railroad the words, or a substantial and essential part of the words, charged, and as charged. It is not necessary that the proof shall show that every word in the sentence was uttered just as averred, but it must be shown that the essential words were uttered. The words necessary to convey the meaning alleged must be shown to have been uttered as charged. It is not enough to show that fragmentary parts of sentences or words taken from different sentences uttered by the defendant, if put together, would support the allegation. It must appear that the defendant used sentences containing substantially the same words as are charged in the complaint.

It is not necessary that the complainant shall, in the first instance, offer any proof bearing directly on his previous good character, or proof that the words, if uttered, were false. He can rely, in the first instance, upon the presumption of good character, without offering proof on the subject. When he has made proof that the words were uttered as charged, the jury will presume that they were false unless proof to the contrary is introduced. While the burden is upon the plaintiff to make out his case as charged, with proof, he is helped out in this respect by the presumption, and is under no necessity to offer direct proof upon the subject.

It is also alleged that the words were maliciously uttered. Malice, too, may be presumed without direct proof. If one has uttered slanderous words of another, and the proof shows that they were spoken on an unjustifiable occasion, malice may be inferred. Malice does not necessarily mean actual ill will or hate. The law presumes a wrongful intention where the words are shown to have been uttered without justification.

Now, in defense, the defendant has put upon paper a general denial of the complaint, denying that he uttered the words, and also two affirmative defenses, which, however, do not seem to be essentially different. In one it is alleged substantially that on the 3d day of September, 1885, there was a meeting of the stockholders of the railroad company on whose road the plaintiff was employed; that they met for the purpose of electing directors and for the doing of other business; that the president of the company and directors and stockholders were present, and that the words charged, if uttered at all, were spoken at that meeting, and were therefore privileged communications, and not actionable; that he had the right at the stockholders' meeting, in the presence of the stockholders and board of directors and the president of the road, to bring these matters to their attention. It is averred that he had been informed beforehand in respect to the subject in such way as to create in his mind a belief, and that in fact he did believe, that the plaintiff

was in the habit of getting drunk, and had ridden over the road in his car in a drunken condition; and that, if he did utter the words alleged, it was done on that occasion.

The second affirmative defense contains a further statement to the effect that Mr. Jewett, president of the road, was present, and made inquiries of the defendant in respect to his objections to the management of the road, and that what he said was in response to these inquiries by the president at this meeting of the board of directors, and was therefore privileged.

The question for you first to consider in logical order is, were the words uttered as charged, or any set of the words? There are three or four different sentences in the complaint which McGrew is charged with having spoken in relation to the plaintiff in connection with his office as manager of the railroad. Has it been proven to your satisfaction that McGrew did utter any one of those sentences substantially in the words stated in the complaint? If so, the plaintiff is entitled to recover, unless some matter of defense is established. Now, all questions of fact are for the jury, and this question of the utterance of words as much as any other. So, too, in respect to the credibility of witnesses, and the weight to be given to their testimony. I have noticed in the progress of the argument that counsel have given you their opinions; have told you about their acquaintance with the witnesses; and that they knew them to be good men or bad men, or the like. All this was out of the proper line of argument. Counsel have no more right in the course of argument to speak of things not proven in respect to the character of a witness in the case than they have to state any other fact not in evidence. It is for you to judge, in the light of all the circumstances, of the force of the testimony before you, whether in depositions or delivered orally. If the witness was before you, you have the benefit of having seen what kind of a man he is, and can make your estimate of him accordingly. I shall not attempt to review the evidence upon the question whether the speaking of any of the words, or any set of the words charged, has been sufficiently proven. If the preponderance of the evidence fairly satisfies you that the words were uttered as charged the plaintiff will be entitled to your verdict unless the words were privileged; and that leads to the inquiry whether the words, if spoken, were privileged or not. It is right under some circumstances to utter words which otherwise would be slanderous, the words being privileged by reason of the circumstances under which they are uttered. The particular privilege set up in this case is that the defendant himself was a stockholder in this railroad company; that there was a meeting of stockholders, and that at this meeting, if at all, he uttered the words charged. It appears in the evidence, without dispute, that the president of the road was present at the meeting and some of the directors at least and a number of attorneys. I believe it is shown that two of these attorneys were not stockholders. Whether they were in the room at the time the meeting was in progress, and when Mr. McGrew made whatever statements he did make in the course of the meeting, is a matter of fact for you. I will say, however,

that at such a meeting as that is shown to have been, McGrew, or any party interested in the railroad, had a right—it was his privilege—to communicate to the president of the road and to the directors and every stockholder present whatever he knew, or had reason to believe, and did in fact believe, in respect to the management of the road or the conduct of any of its employes; and if Mr. McGrew did use, in that meeting, the words charged, or any of them; and if upon information that he had received, either from others or by his own observation, or from both sources, he believed that the statement which he made was true,—then the fact that it was made in that meeting would constitute the communication one of privilege, and not actionable.

The suggestion is made that the presence of parties who were not stockholders destroys this privilege. So far as I have observed, the evidence does not reveal the presence of any who were not stockholders, except two or three attorneys who have been witnesses. The testimony shows that these gentlemen were present at the instance and request of the officers of the road, —of the president, at least, and possibly of some of the directors. There has been some criticism upon these attorneys for being present. I make no comment upon that. It is aside from anything I need instruct you about, and is left to your own judgment. I do say that these gentlemen, who were in the employment of the company as attorneys, being thus present at the request of the president of the road, their presence did not take away from Mr. McGrew, or any other director present, the right to make communications of the kind in question, directly to the board, or to the president or to the stockholders assembled there. Their presence in that manner did not affect the privilege or right of a stockholder to criticise the management of the road or the conduct of employes.

Something has been said to the effect that the election of directors was over when the words were spoken, and therefore they could not have been uttered with a view of affecting the election. The privilege, however, in such a case, does not depend upon the fact that the election had or had not been held. The president was there, and some of the directors, and the privilege might well and properly be exercised after the choice of the new board, in order to indicate what reforms ought to be accomplished in the management; and it is not material whether or not the defendant had tried to get a new board of directors. That fact would not affect the right of any officers remaining or coming in control to make the necessary investigation and correction, if there were such evils prevailing as stated in the words complained of; so that the question whether the election had taken place is not material to the determination of this question of privilege. If the utterance was to the people who had the management of the road, or some of them, and in the presence of others who were interested in it, and who were called to participate in that meeting, it was privileged, no matter to what stage the business had reached.

But a question arises which is somewhat different; that is, whether the meeting had not terminated, and whether the words were uttered to any who were not entitled to receive them as privileged communications. It

is claimed on behalf of the plaintiff, and I believe his counsel rest their case on that assertion, that the words were not uttered in the room where the meeting was held, but were spoken outside of the door to attorneys and to men who were not members of the board, or interested in the board directly. Now, whether the words were uttered outside of the door or inside does not determine necessarily whether they were privileged or not. There might be a meeting going on where the party would have the right to utter the words, if he chose to, to those who were interested in the subject, and there he might turn aside to some individual who was not interested, and utter the words to him without any justification for so doing; so that whether these men had passed the door or were still inside the room has little to do with the question. If the words were really addressed to an individual or individuals having no interest in the subject, and not to the meeting, nor to others who were concerned in the management of the road, they might be actionable or slanderous. Now, then, were the words uttered in the hall to Judge Slick and Mr. Johnson and Mr. Attlebury, and overheard by Mr. Peterson, slanderous? Strictly speaking, the words so uttered would not be privileged if then spoken for the first time; but if the same words had been uttered in the meeting, or words to the same effect, embodying the charge of drunkenness against Mr. Broughton, so that the accusation became known to all present, in a way to be privileged, and then, as the parties were leaving the room, there was a repetition of the matter by Mr. McGrew to men who were present and heard the words first uttered, I would say that no action ought to be maintained for the repetition of the words to those who had already heard them when it was proper to utter them. It was a matter from which it could not be said any damage could result, because the parties had already heard it; especially if the second utterance occurred in a discussion between the defendant and these attorneys, who were controverting his statement made in the meeting. In determining, therefore, whether or not the utterance of the words to these attorneys is an actionable or slanderous utterance it is important for you to determine whether substantially the same charge had first been made in the meeting, and to the meeting, in a way to be privileged. If the charge had not been made to the meeting, and this was a voluntary utterance by the defendant to these attorneys, then, in my judgment, the words ought not to be held privileged, and I so instruct you; and you would be entitled to find for the plaintiff on account of what was thus voluntarily said to the attorneys, whether done inside the door or outside the door. If the defendant got the attorneys aside, or happened to be aside with them, and brought up for the first time the charge against Mr. Broughton, it was a slanderous and unjustifiable charge, which would support the action; but if it was a mere repetition, growing out of a discussion in respect to what he had said in the meeting on the same subject, then I think the privilege ought to be considered as covering the repetition of the words, and so instruct you.

Many things have been said, gentlemen, about other questions,—whether the road was in good condition; whether McGrew had cause for

seeking a change of management; and whether he was acting in good faith in regard to the interests of the road. Much has been said about getting control of the corporation, or organizing it in the interest of a scheme. All these things are remote in their bearing. The question for you, first and mainly, is whether McGrew uttered these words about the plaintiff, and whether he uttered them without justification. He claims he did it justifiably in discharge of his duty to the board. The mere fact that he uttered them to the board would not necessarily be a justification. He must, of course, have done it in good faith. If he uttered the words to the board, and did not believe them to be true, there was for that, of course, no justification. If you find he did make the charge of drunkenness against Broughton as alleged, did he do it in good faith? He has testified, and much proof has been introduced in respect to the information that he had on the subject. If he had been told by creditable men of facts which fairly led him to believe, and entitled him to believe, there was something wrong in Broughton's conduct in this respect, he had the right to bring the matter up, and you may presume he did it in good faith unless the evidence shows the contrary. Of course, if the evidence convinces you that he did not have good cause to bring it forward, had not received information that would warrant a prudent man in bringing such a charge forward, you will say he did not act in good faith, and will not give him the benefit of the privilege to which otherwise he might be entitled. Every presumption is in favor of good faith if he had information on the subject that a reasonable man might have acted upon.

If you find for the plaintiff, then the question arises, what damages will be proper? The action, as I have already explained to you, proceeds upon the theory that the injury has affected the plaintiff in his business. The mere charge of drunkenness is not an actionable injury, and is significant in this case, because the injury that you will consider will have reference to the effect of the slander upon the complainant's business and his business prospects, not upon his character as an individual in a community, because in that respect all men are affected alike by an accusation of drunkenness, and the law does not recognize it as good cause for an action except when it affects the man in his business or prospects of business, and therefore the jury, in determining the amount of damages to be awarded, must revert to that phase of the subject. Damages may be compensatory, and they may be vindictive or punitive. Punitive or vindictive damages are assessed, if at all, on the ground of public policy, and not on the ground that the plaintiff has any right to the money. In order to prevent a repetition of a wrong the jury may assess vindictive damages, in the way of punishment, which will go to the plaintiff because assessed in his suit, but not on the theory of compensating him, so much as of punishing the wrong-doer. Punitive damages, however, are not to be assessed unless the words were not only wrongful, but were uttered with actual malice on the part of the defendant; so that, unless the evidence shows to you that the defendant uttered the words with actual malice, ill will, or hatred towards the

plaintiff, or with such clear want of ground for doing it as to warrant an inference of ill will or hatred, you will assess only compensatory damages. Compensatory damages are for the purpose of making whole the plaintiff for the injury done him, for the injury in respect to his business and business prospects that has actually arisen or is likely to arise, from the words uttered in the manner and at the time they were spoken. Of course, there is no fixed standard by which such damages can be measured. Characters have no price in the market. The extent of the injury must be determined from the evidence. The jury must exercise sound judgment and discretion. You have a right to consider all the circumstances in the case. If the slander was uttered under one set of circumstances it might have greater effect than if uttered under other circumstances, and when uttered to some persons it might do more harm than when uttered to others. In this case there is some evidence that there had been rumors of these things circulating in the community, rumors of charges of this kind, before McGrew uttered the words. If that is a fact, you have a right to take it into consideration. A man that starts a false report may be held to greater responsibility than a man who merely repeats or adds to the story. The fact that the defendant uttered the words on his own authority, or on the authority of others of whom he had heard the reports, may be taken into consideration. If he said these things on his own authority, claiming to know them himself, that would tend to give them greater weight and currency than if he professed merely to speak from rumors or information derived from others, indicating the source of his information. The character of the defendant himself, his standing in the community, is a matter which you may consider in determining the amount of damages. A man of high character, of known force and influence in the community, may injure another by talking about him more than a man of less character could do. So, on the other hand, the character of the party spoken about is a matter that may be taken into consideration. If he has a well-established character, that there is less likelihood of the slander hurting him, may be considered, whereas, if he was a new man starting in the effort to build up a reputation, the same slander might well cause more harm. You will consider the persons to whom the slanders were uttered, and the relation they occupied to the parties. These attorneys of the road were not in a position, as I have instructed you, to be treated as officers of the road, to whom such communications could be made as matter of privilege; yet, I think, if Mr. McGrew had gone to the attorneys of the road with the accusation against Mr. Broughton, and urged upon them to go to Mr. Jewett with the matter, I am not sure but that his action might have been privileged. It would certainly be a strong circumstance to rebut malice. Upon the circumstances as stated here, however, while I instruct you that if the words charged were uttered to these attorneys in the first instance, and not as a repetition of what was said in the meeting, they were not matters of strict privilege; yet the fact that these gentlemen were attorneys of this road, and had friendly relations to the officers, or to the plaintiff, you may consider in deter-

mining how much damage ought to be assessed. If these three gentlemen were the persons to whom these words were spoken, you can consider their relations to the plaintiff and the likelihood of words spoken to them concerning him reaching the public through their agency, and to what extent they would be likely to cause him injury. The plaintiff cannot claim damages for acts of his own or for the publicity given to the matter by the bringing of this suit, because that was brought of his own choice. It is for you, if you find for the plaintiff, to say upon all the facts and circumstances in proof what damages you think ought to be awarded, whether compensatory, or both compensatory and vindictive.

TILGHMAN *v.* WERK *et al.*

(*Circuit Court, S. D. Ohio, W. D.* August 30, 1889.)

1. PRACTICE IN CIVIL CASES—NUNC PRO TUNC ORDER.
   An application by respondents for a *nunc pro tunc* order dismissing complainant's petition to vacate a decree made in 1878, and for a rehearing, the application being based on an alleged action or opinion taken or expressed by the circuit judge by whom the petition was heard in 1884, will be refused where there was no final decision or judgment rendered, and no official record on which to base such an order, and nothing but the recollection of witnesses as to what the judge said about the case when not presiding in the court where the cause was pending.
2. BILL OF REVIEW—GROUNDS.
   An application for a bill of review will not be granted where no actual fraud is set up, and the affidavits on which the application is based show that no fraud in fact was practiced in obtaining the decree, and no error of law apparent on the face of the decree is either set up or relied on.
3. SAME—NEW MATTER.
   A change by the supreme court of its ruling on a question of law and fact does not constitute such new matter as will sustain a bill of review to vacate a decree of the circuit court pronounced before such change was made.
4. SAME.
   Neither will a bill of review be granted because the case was decided in the absence of counsel, where the means of knowledge as to the time of hearing was within reach of counsel, and no effort was made to deceive him by the opposite party, though the petitioner may have been misled by the negligence or misinformation received from his counsel, or of those to whom the counsel had intrusted the business.
5. SAME—LACHES.
   An application for a bill of review, made in 1889, on facts known by petitioners in 1881, comes too late, even if the facts constituted a good ground for relief.

In Equity. Application for leave to file bill of review.

Francis T. Chambers and *Perry & Jenny*, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly and *Paxton & Warrington*, for defendants.

JACKSON, J. The motions made herein by complainant and respondents should each be severally denied.

1. The motion of respondents for a *nunc pro tunc* order dismissing the complainant's application or petition to vacate the decree herein of April 9, 1878, and for a rehearing of the cause, based upon the alleged action or opinion taken or expressed by the circuit judge at Knoxville, Tenn., on the 29th day of July, 1884, when said petition was heard by him, should be refused, because that action or opinion of the circuit judge never assumed the form of the final decision or judgment of this court, wherein the cause was pending, because there is no official record or memoranda of this court on which to base or rest the *nunc pro tunc* order now applied for, and because it would be contrary to sound policy and destructive of that certainty and conclusivenes which should attend judicial action to base judgments and decrees upon the recollection of witnesses as to what the judge of a court may have said about a case when not presiding in the court where such cause is pending. Judicial action should not rest upon a foundation so unstable and insecure. The circuit judge may, undoubtedly, by consent of parties, hear a cause outside of the particular district in which it is pending, but the opinion or view he may express on such a hearing does not rise to the dignity or assume the force of a judgment of the court wherein the case is pending until some official notice or communication of the judge's opinion or decision is made or transmitted to the proper officer of such court, whose duty and function it is to enter or preserve some record of all judicial action taken or had therein. A judge's opinion when and while absent from the court over which he presides, in respect to matter or questions therein pending for decision, however called forth or expressed, falls short of being the judgment of such court. Judicial action is reached when the judge's opinion is expressed in, or conveyed in some authoritative manner to, the court wherein the controverted matter is pending. No judicial action such as will warrant the entry or granting of a *nunc pro tunc* order dismissing complainant's petition is shown in the present case. Furthermore, the parol testimony leaves some doubt as to what were the precise views and opinions of the circuit judge in respect to complainant's petition. Under such circumstances the respondents' motion could not be properly allowed. It is accordingly denied, with costs.

2. The complainant's petition filed July 27, 1881, to vacate the decree of April 9, 1878, and for a rehearing of the cause, should now be dismissed. This petition cannot be treated or regarded as an original bill in the nature of a bill of review, which lies only for fraud; and such fraud, as has been said by very eminent judicial authority in an English case, must be actual and positive, showing a *mala mens*,—a meditated and intentional contrivance to keep the opposite party and the court in ignorance of the real facts of the case, and thus obtain the decree. *Patch* v. *Ward*, L. R. 3 Ch. 203. No such fraud is set up or relied upon, and the affidavits in support of and against the petition clearly establish that no fraud in fact was practiced by respondents or their counsel in procuring said decree. Neither can this petition be treated as a bill of review to correct errors of law apparent on the face of said decree of April

9, 1878. No error of law apparent on the face of the decree or the record is either set up or relied upon in said petition. The petition to vacate said decree is filed after the term at which it was rendered, more than two years after the rendition of the decree. It is clear that the court has no authority or jurisdiction to set aside or vacate a decree under such circumstances and grant a rehearing, except for good cause shown, and in the absence of negligence on the part of the petitioners. The matters *dehors* the record which are relied upon as grounds for vacating the decree are—*First*, that there was an agreement or understanding between complainant's counsel and counsel for respondents that this suit should stand suspended and undisposed of until the suit of *Tilghman* v. *Proctor* (102 U. S. 707) should be decided by the supreme court of the United States, and that this understanding was without the knowledge and consent of complainant and his counsel, disregarded or ignored in taking said decree; and, *secondly*, that the decree of April 9, 1878, sought to be vacated, was based upon the decision of the supreme court of the United States in case of *Mitchell* v. *Tilghman*, 19 Wall. 287, holding the complainant's patent to be invalid, and that subsequently, in the case of *Tilghman* v. *Proctor*, the supreme court had changed its ruling on said patent, holding the same to be valid, and that the decision in *Mitchell* v. *Tilghman* was erroneous, etc. This last decision or holding of the supreme court, it is claimed for petitioner, constitutes new matter *in pais* occurring since the decree, and furnished a good ground for sustaining the petition as a bill of review. While the suits against respondents and against Proctor and Gamble were founded upon the same patent, it is not alleged in the petition that they had any connection with each other; they were separate and independent suits. Their only connection with each other rested in and upon the alleged agreement or understanding of counsel that *Tilghman* v. *Werk* should await the result of *Tilghman* v. *Proctor*. While the decision of the supreme court in *Mitchell* v. *Tilghman* may have been the real ground on which this court based its decree of April 9, 1878, that fact does not appear upon the face of the decree, and the question is presented whether a change of its ruling or decision by the supreme court on a question of law or fact, or upon a mixed question of law and fact, constitutes such new matter as will sustain a bill of review to vacate decrees of the circuit court pronounced before such change was made. We think, upon principle and authority, this proposition cannot be maintained. The cases cited and relied on by counsel for complainant do not, in our opinion, sustain his contention. Such a rule would prolong litigation greatly, and render judicial decisions unstable in the highest degree. The weight of authority, as shown in the cases cited by counsel for respondents, is against this position of complainant's counsel. As to the alleged agreement to suspend action in this suit until the case of *Tilghman* v. *Proctor* could or should be decided in the supreme court, the evidence introduced in support of and against said petition not only fails to establish such an understanding or agreement, but tends strongly to show affirmatively that no such agreement was made or concluded between counsel for the respective parties. The cor-

respondence between those counsel, commencing with the letter of Judge Coffin to Mr. George Harding, of date January 23, 1877, and including the letters of March 25 and 27, 1878, are inconsistent, and irreconcilable with the existence of the agreement alleged. If the counsel for complainant failed to receive or to be advised of the letters written him by counsel for respondents under date of March 30, 1878, and April 3, 1878, it was the fault or neglect of those he left in charge of his office and business. The letter of March 30, 1878, from Coffin, counsel for respondents, expressly declined to stipulate for any postponement of action in or suspension of this suit, as proposed by Harding, and the letter of April 3, 1878, notified him as to the day and date when respondents' counsel would take action, and move the court to dismiss complainant's bill. The alleged agreement is said to have been first made in 1874. Subsequently to that this court granted respondents' application for a rehearing, and the petition admits that in 1877 complainant and his counsel knew that such rehearing had been granted. It is the duty of litigants to be in court, either in person or by attorney, when their cases are called, and to see that proper steps are taken for the protection of their rights. It is no ground for a bill of review that a case is taken up and decided in the absence of counsel. It was so decided in *Quarrier* v. *Carter*, 4 Hen. & M. 242, and *Wiser* v. *Blachly*, 2 Johns. Ch. 490. The means of knowledge as to the steps being taken in the suit were within easy reach of complainant and his counsel. No effort was made or device resorted to on the part of respondents and their counsel to conceal the action of the court, or to keep the other side in ignorance thereof. The proposition that complainant may rely for relief upon the negligence of or misinformation received from his counsel, or of those to whom such counsel has intrusted the care and attention to his professional business, is not sound, and is not supported by authority. Petitioner has not in and by his petition shown that proper diligence was exercised to secure or preserve his remedy by appeal, and, aside from the evidence introduced, it is exceedingly doubtful whether the allegations of his petition are sufficient upon their face to sustain the same or entitle him to the relief sought. But, for the reasons above stated, his petition should not be granted. It is accordingly dismissed, with costs.

3. The application of complainant, made April 11, 1889, for leave to file bill of review herein should be refused. The only new or additional matter presented in the bill of review now asked to be filed is the alleged connection of respondent Werk with the suit against Proctor and Gamble. It is alleged that said Werk and his counsel, Collier, instigated that suit, or rather Proctor and Gamble's infringement of complainant's patent and the denial of his rights, and indemnified them in resisting complainant's claims. The affidavits of Werk and Collier, the parties implicated in said charge, fully met and explained the same, and show that the allegation is not well founded. But, aside from that, this connection of Werk and Collier with the Proctor and Gamble suit, and the defense thereof, was known to complainant as early as 1881. It is now too late for him to rely upon that alleged fact. He is repelled by his laches from invok-

ing any relief on that ground, even if it were otherwise a good ground. All other matters set out in the bill of review now sought to be filed are the same as those presented in and by the petition filed in 1881, and already noticed and disposed of. Leave to file said bill of review is accordingly denied, with costs of the motion.

COMMERCIAL NAT. BANK *v.* ARMSTRONG.

(*Circuit Court, S. D. Ohio, W. D.* August 30, 1889.)

1. PRINCIPAL AND AGENT—BANKS AND BANKING—COLLECTIONS.
The F. Bank offered to "collect at par" all paper sent it by complainant, "and remit" on specified dates." Complainant accepted the offer on a letter-head containing the printed words: "For collection, ———; for credit, ———." All paper sent under this agreement, was, at the suggestion of the F. Bank, indorsed, "Pay F Bank for collection ———, for" complainant. The F. Bank thereafter wrote to complainant that "we collect at par, and include in our remittances everything collected to date." All paper sent by complainant was charged on its books to the F. Bank, "cash items" on transmission, and "time items" on their collection by the F. Bank, on whose books like credit entries to complainant were made. While complainant's cashier testified that in making such charges he understood that the F. Bank became indebted to complainant, he also stated that it was not intended to transfer the paper to or open a deposit account with the F. Bank. *Held*, that the relation between the F. Bank and complainant as to paper sent by the latter was that of principal and agent, and not that of creditor and debtor.

2. SAME.
Such relation also continued as to proceeds of such paper collected by the F. Bank.

3. TRUSTS—IDENTIFICATION OF TRUST FUNDS.
Complainant can recover on the ground of a trust, from a receiver of the F. Bank, which has failed, such portion only of the proceeds of its paper sent to the F. Bank as it shows has passed into the receiver's hands either in its original or some substituted form.

In Equity.

Bill by the Commercial National Bank of Pennsylvania against David Armstrong, receiver of the Fidelity National Bank, to recover certain funds.

Harmon, Colston, Goldsmith & Hoadly, for complainants.

E. W. Kittredge, Jos. Wilby, and *W. B. Burnet*, for defendant.

JACKSON, J. The general object and purpose of the bill in this case is the recovery of certain funds, which the complainant claims are impressed with a trust character in its favor, and which it is alleged have come into the possession of the defendant as the receiver of the Fidelity National Bank of Cincinnati. The trust character of the fund claimed is disputed, and that constitutes the real controversy between the parties to the suit.

The material facts of the case, as established by the evidence on which the questions of law arise, and the right to the relief sought depends, are

the following, viz.: The Fidelity National Bank, desiring to open and establish business relations with the complainant, addressed to it, under date of February 12, 1887, the following circular letter and propositions:

"*Coml. Nat. Bnk., Philadelphia, Pa.*—GENTLEMEN: Inclosed herewith we hand you our last statement, showing us to be the second bank in Ohio in deposits in the tenth month of our existence. We should be pleased to serve you, and trust you will find it to your advantage to accept one of the following propositions:

"No. 1. We will collect all items at par, and allow 2½ % interest on daily balances, calculated monthly. We will remit any balance you have above $2,000 in New York draft, as you direct, or ship currency at your cost for expressage.

"No. 2. Will collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month.

"No. 3. We will collect at par Ohio, Indiana, and Kentucky items, and remit balances every Monday by draft on New York. We do not charge for exchange on propositions No. 1, 2, and 3.

"No. 4. Will collect Cincinnati items, and remit daily at 40 cents per thousand, or 20 cents for $500 or less. National banks not in a reserve city can count all they have with us as reserve. Your early reply will oblige."

To this communication the Commercial National Bank replied on February 18, 1887, accepting the second of the above propositions. This letter of acceptance was written upon one of the printed letter-heads which complainant was in the habit of using in its general business intercourse with correspondents, relating to paper received or transmitted for collection; the printed portions of the letter being in the following form:

"COMMERCIAL NATIONAL BANK OF PENNSYLVANIA.

"PHILADELPHIA, ——— 188—.

"*To* ——— *National Bank* ———.

"Yours of ——— inst. is received, with inclosures as stated.

"Respectfully,

———,

"For Cashier.

"I inclose for collection, ———; for credit, ———."

Along with this letter of acceptance complainant transmitted certain sight drafts or checks to the amount of $2,007.55, indorsed for collection for Commercial National Bank, which constituted the first dealings or transactions between the two banking associations. Upon the receipt of complainant's acceptance of its said second proposition the Fidelity National Bank caused to be prepared and forwarded to the Commercial National Bank a stamp to be used by it in indorsing paper transmitted for collection, under and in pursuance of the contract and agreement then entered into between the two banks. The impression or indorsement made by said stamp was this:

"Pay Fidelity Natl. Bank of Cincinnati, O., for collection for Commercial Natl. Bank of Philadelphia. E. P. GRAHAM, Cashier."

Commencing with its letter of acceptance of said second proposition, complainant continued to forward to the Fidelity National Bank, for collection, commercial paper, consisting of checks, drafts, and promissory notes, payable in the designated territory either at sight or on demand, or at a certain time after date or after demand, until June 21, 1887,

when the Fidelity National Bank, having become insolvent, was closed by the comptroller of the currency, and soon thereafter defendant was appointed receiver of its assets, and its charter was forfeited. Upon all the paper which complainant transmitted to the Fidelity National Bank for collection under the contract formed by the acceptance of said second proposition, there was placed by the use of the stamp furnished by the Fidelity National Bank the above special indorsement:

"Pay Fidelity Natl. Bank of Cincinnati, O., for collection for Commercial Natl. Bank of Philadelphia. E. P. GRAHAM, Cashier."

At the date of its failure and suspension, the Fidelity National Bank had not accounted for paper so indorsed and transmitted by complainant between the 4th and 20th June, 1887, to the amount of $16,000 or $17,000. There is no dispute as to the items making up said amount, or as to the fact that each of said items were duly received by said Fidelity Bank, and have, upon each item or piece of paper, the special indorsement aforesaid. It was not understood or intended by either the transmitting or the receiving bank that the title to the paper sent forward for collection should pass to or be vested in the Fidelity Bank; on the contrary, the agreement and understanding between them contemplated (what was expressed by the proposition made and accepted, and the indorsement placed on the paper) that the title to all such paper should be and remain in the complainant, who neither opened or intended to open any deposit account with the Fidelity National Bank. Previous to this special arrangement entered into between them, they had had no business connection or transactions, and kept no accounts with each other. All the paper forwarded by complainant between the 4th and 20th June, the proceeds of which are involved in this controversy, was transmitted in letters having the printed form of letter-heads, as above indicated; and in conformity with the general usage and course of business between banks occupying towards each other such relation as the contract in question created, or sending and receiving commercial paper for collection, a distinction was made between such paper as was payable at sight or on demand, and such as was payable at a certain day, after date or after demand. The former were designated as "cash items," and the latter as "time paper." The course of business between the two banks, and the method of keeping their accounts with each other, were as follows: When "cash items" were transmitted by complainant to the Fidelity National Bank, including these embraced in the present controversy, they were entered as of the date of their transmission on the foreign cash item book of the former, and from said book such entries were posted into the general account of the Fidelity Bank on complainant's books, as of such date; and, when such "cash items" were received by the Fidelity National Bank, it credited the same on its books to the complainant as of the date received, and charged the same to its correspondents to whom such "cash items" were sent by it for actual collection. If such "cash items" were not paid on presentation, the Fidelity National Bank would charge them back to complainant, and re-

turn them, whereupon complainant would credit the Fidelity Bank with the same upon the account which it kept against the latter. When the complainant transmitted "time items," or papers including that covered by this suit, the same were entered on complainant's foreign collection register as of the date of transmission, and were not entered upon the general account of the Fidelity National Bank, upon the books of the Commercial National Bank, until advice was received from said Fidelity Bank that such time items had been collected. The Fidelity National Bank neither credited nor remitted complainant such time items until it had received advice from its correspondents of their payment. The books of the Fidelity National Bank show to whom it sent all the paper, both "cash" and "time items," for collection, and when the same was collected by its correspondents, with all or most of whom it had currrent accounts showing balances in favor of or against said Fidelity Bank from day to day, and at the time of its suspension. Up to June 4, 1887, the Fidelity National Bank, in pursuance of, and in compliance with, its contract and agreement, made remittances with complainant on the 1st, 11th, and 21st of each month of collections made up to the date of each remittance, accompanying the same with a statement of the several collections made and included in such remittance. Such statements designated and identified the separate items of paper which had been collected. Such remittances, together with any and all such cash items as were not paid on presentation, were, by the Fidelity Bank, charged back against the complainant on the books of the former, and were credited to the Fidelity on the books of the complainant. Under date of May 25, 1887, the complainant's cashier, E. P. Graham, wrote the cashier of the Fidelity Bank as follows:

"DEAR SIR: We do not wish to complain, but would like to understand why your remittances of May 21st only included items sent you up to May 14th, and received by you on the 16th. We have to explain these things to our depositors, and wish to act intelligently on the subject. Yours, etc.

"_____."

To this communication the Fidelity National Bank, through E. L. Harper, vice-president, returned the following reply:

"GENTLEMEN: We collect at par, and include in our remittances everything collected to date."

The complainant made no objection to this construction of its undertaking of the Fidelity National Bank, but acquiesced therein, and continued to transmit paper for collection under the contract as thus interpreted, such paper being charged and credited as already stated.

On the foregoing statement of facts three leading questions are presented for consideration and determination: *First*, what, under their contract and course of business, was the relation created between the two banks in respect to the commercial paper which complainant sent to the Fidelity Bank for collection? *Second*, what, if any, change or modification of that relation was made or effected as to the proceeds of such paper after actual collection thereof by the Fidelity National Bank, or its correspondents? And, *third*, how far, or to what extent, can complainant

follow and impress upon the proceeds of such paper a trust such as will entitle it to a recovery out of funds in the hands of the receiver?

For the complainant it is insisted that the relation established by the contract, and the indorsement placed upon the paper transmitted for collection, was only that of principal and agent; that the title to the paper and to the proceeds thereof never passed to the Fidelity National Bank, but remained in itself; and that the Fidelity National Bank having, as such agent, collected its paper, and failed to account for the proceeds, the amount thereof so received constituted a trust fund which complainant may rightfully follow, and recover in full out of the general assets of the Fidelity Bank which have or may come into the hands of the defendant as the receiver of the same. The defendant controverts those propositions, and claims that the agreement and course of dealings established between the two banks no other relation than that of creditor and debtor; that in respect to sight or demand paper, designated as "cash items," which complainant, at the date of its transmission, charged up to the Fidelity National Bank, and which the latter, on receipt thereof, credited to the complainant, such relation of creditor and debtor arose when such paper was received by the Fidelity Bank, and credited on its books to the complainant; that in respect to paper payable on a certain day after date or after demand, called "time paper," the creditor and debtor relation between them commenced upon the actual collection of such paper, and when the Fidelity National Bank gave complainant credit for the same. It is further claimed for the defendant that the proceeds of all such paper received and collected were so mingled and blended by said Fidelity National Bank with its own funds and credits as to be undistinguishable or incapable of identification, and that for the amount of its debt or claim complainant can only share *pro rata* with other creditors of the Fidelity National Bank in the distribution of its assets in defendant's hands.

The facts and circumstances specially relied on by counsel for defendant to support their contention of a creditor and debtor relation between the two banks are—*First*, the printed words, "For collection, ———; for credit," found in the letter-heads used by complainant in transmitting paper to the Fidelity Bank; *secondly*, the act of the parties in debiting and crediting the "cash items" at the dates of transmission and receipt; and, *thirdly*, the statement made by complainant's cashier, Mr. E. P. Graham, that in thus charging the Fidelity Bank with such "cash items" he understood or intended that the latter thereupon became indebted to his bank. It is true that Mr. Graham in his deposition makes such a statement, but his meaning, as subsequently explained, was obviously that the Fidelity National Bank was chargeable with such items, and would, upon the collection thereof, be liable to complainant for the same. He hardly meant to be understood that upon his bank's making such a charge as paper transmitted, the property in such paper thereupon vested in the Fidelity Bank; for in other portions of his testimony he clearly states that it was not intended to transfer the paper to the collecting bank, or to open any deposit account with it. On the other

hand, the Fidelity National Bank did not understand or so interpret the contract as to consider itself absolutely bound to the complainant for all such paper as so much money deposited with it, or that by crediting the complainant with the amount thereof it becomes the owner of the paper. This is clearly shown in its reply to complainant's letter of May 25, 1887, where it is said: "We collect at par, and include in our remittances everything collected to date," (of remittances.)

This contemporaneous construction placed upon its undertaking by the Fidelity Bank is inconsistent with the idea that an actual, present indebtedness arose upon its receipt of such paper for the amount thereof, so that it thereupon became the owner of the same. The parties in this contract made no distinction between "time paper" and "cash items." The same indorsement, "Pay Fidelity National Bank of Cincinnati, Ohio, for collection, ———, for Commercial National Bank of Philadelphia, Pa.," was placed upon both classes of paper alike. In keeping their account with each other "cash items" were charged and credited before, and "time paper" after, collection. This difference in time of making such entries cannot, when considered in connection with the express agreement of the parties, operate to split up their contract, so as to make one rule for "cash items" and another for "time paper." There was no such understanding. But, in connection with the mode adopted of charging and crediting "cash items" transmitted and received, it is said by counsel for defendant that the Fidelity National Bank in some instances remitted to complainant on the dates designated before actual collection; that "cash items" received, say on the 10th of May, would, in some cases, be remitted on the 11th of May, before the same was collected by the Fidelity Bank. If any such instances actually occurred, (which does not appear satisfactorily to be the fact,) the act of remitting was wholly gratuitous on the part of the Fidelity Bank,—was not in accordance with its own interpretation of its undertaking, and could not have the effect of annulling or modifying the real contract of the parties. Nor can the printed words, "For collection, ———; for credit," found in letter-heads which complainant generally used in forwarding paper to the Fidelity Bank, control the express written contract of the two banks. That contract is found in the proposition made by the one and accepted by the other. The offer was to "collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month." In accepting that proposition complainant did not intend by the use of printed letter-heads containing the words, "For collection, ———; for credit," to change or modify the offer made by the Fidelity Bank, or to suggest a different arrangement; neither did the Fidelity Bank so understand complainant's letter of acceptance. The printed words, "For collection, ———; for credit," cannot now be reverted to for the purpose of showing a different contract or arrangement from that embraced in the proposition made and accepted. Any such operation and effect given to these printed words would do manifest violence to the clear intention of the parties, and violate the well-settled rule that printed words, such as, "For collection, ———; for credit," must be con-

trolled by the written proposition made and accepted, if the latter is inconsistent with the former. Ordinarily, when a customer sends commercial paper to a bank to credit the proceeds, and such credit is given when the paper is collected, if nothing more appears, the relation thereby created between the parties is that of creditor and debtor. The bank becomes the customer's debtor for the amount so credited, subject to payment on demand, but is under no duty or obligation to remit. In the present case the arrangement proposed in and by the second proposition involved the performance by the Fidelity National Bank of two agency duties and functions, viz., the undertaking to collect all papers payable west of Pennsylvania, sent it by complainant, and the obligation to remit the proceeds at or upon designated dates. In addition to the agency services contemplated, the special or restrictive indorsement (the form of which was made and suggested by the Fidelity Bank) placed upon the paper transmitted by complainant, would, in and of itself, have created the relation of principal and agent between the two banks.

We think this is settled by the rule laid down in *White* v. *Bank*, 102 U. S. 660, 661, and by the decisions of this court in *Winters* v. *Armstrong*, 37 Fed. Rep. 508, and *Montgomery Nat. Bank* v. *Armstrong*, 36 Fed. Rep. 59. In the latter case the indorsement which the transmitting bank placed upon the draft forwarded to the Fidelity Bank, was, in all essential particulars, the same as that employed by complainant, and this court held that the relation thereby created between the two banks was that of principal and agent; and the Montgomery National Bank, having traced the proceeds of its paper into the receiver's possession, was allowed to recover the same as a trust fund. In the *Montgomery Bank Case* there was, besides the special indorsement, a direction, contained in the letter of transmission, to remit the proceeds of the collection, without any specification as to the time of remitting. Here the dates for making remittances are specified. In the *Montgomery Bank Case* the law fixed or prescribed "a reasonable time" from date of collection in which the remittance by the agent should be made. Here the parties have in advance agreed upon and designated the time or times for remitting. This difference is insufficient to distinguish the two cases. But the question is put beyond all doubt, if, as we may properly do, we read into the restrictive indorsement which complainant placed upon all the paper it transmitted the special contract of the parties, made by complainant's acceptance of said second proposition. It would then stand thus: "Pay to the Fidelity Natl. Bank for collection for Commertial Natl. Bank of Philadelphia, Pa. This paper is to be collected at par, and the proceeds remitted to the Commercial National Bank on either the 1st, 11th, or 21st days of the month next after day of collection, without exchange." That such an indorsement as this would make the receiving bank the agent of the transmitting bank admits of little or no debate. The contract of the parties, taken in connection with the special indorsement agreed upon by both, renders it clear, both upon principal and authority, that, so far as concerns the paper in question, the relation between complainant and the Fidelity

National Bank was not that of creditor and debtor, but that of principal and agent.

The next question presented is, did they occupy any other or different relation to each other as to the proceeds of such paper after actual collection thereof by the agent bank or by its subagent? The agency relation being established as to the paper, the money received thereon should stand upon the same footing, and be held in the same capacity, by the collecting bank. The relation of principal and agent as to the proceeds of such paper could not be changed to that of creditor and debtor without the consent or concurrence, express or implied, of both parties. The agent certainly could not, by an act of his own, divest himself of his fiduciary character in respect to the proceeds of paper he had collected as agent. His method of keeping his accounts with his principal would not terminate his agency relation, or convert him into a mere debtor, without the assent, express or implied, of his principal. In the present case there was no intention, express or fairly to be implied, that the parties considered the proceeds of the paper as standing upon a different footing from the paper itself. The accounts which they mutually kept of their business were properly principal and agency accounts, as distinguished from creditor and debtor accounts. They were kept in the usual way banks keep their collection accounts. It was not the understanding of either (certainly not of complainant) that any creditor or debtor relation as such was to be credited in respect to the proceeds of paper sent out for collection. The first proposition submitted by the Fidelity National Bank perhaps contemplated a creditor and debtor connection, but the second, third, and fourth upon their face did not. Aside from the contract embodied in the accepted proposition, the plain meaning of the special indorsement used is that the Fidelity National Bank was to collect the paper and receive the proceeds "for account" of the complainant, and such proceeds were to be remitted on certain days next after collection. We think it clear that the principal and agency relation created as to the paper continued as to the proceeds thereof. Such being the relations of the two banks, the remaining question is how far, or to what extent, can complainant follow and impress upon the proceeds of its paper a trust as against the funds in the hands of the defendant as receiver of the Fidelity National Bank's assets? When an agent, or one occupying a fiduciary position, converts trust property or moneys to his own use, or improperly invests the same in other credits or securities, two remedies are open to the principal. He may elect to treat such agent as his debtor for the amount, or he may follow his property or funds, so long as the same can be traced and identified, until they reach a *bona fide* holder thereof without notice of his right, and impress upon them, either in their original or substituted form, a trust. The complainant seeks the latter remedy, and, through its counsel, claims that a trust should be established in its favor against all the assets of the Fidelity Bank in the possession of defendant, without imposing upon it the duty of tracing its funds into the receiver's hands, because such funds, whether actually received by the defendant as receiver or not,

have gone to swell the estate or assets of said Fidelity National Bank. Some cases are cited which seem to support this position, but they are not sound in principle, nor in harmony with the decided weight of authority. In seeking to follow and impress a trust character upon funds which an agent has misapplied, it is incumbent upon the principal to clearly trace such funds into the hands of the party against whom the relief is sought; and, so long as the trust fund or property, in either its original or substituted form, can be traced and identified, it may be followed and recovered by the true owner, provided it has not come into the possession of some *bona fide* holder for value without notice. This right of the principal "only ceases when the means of ascertainment fails," or when his property or fund has reached a *bona fide* holder for value, and without notice of the trust.

It is not deemed necessary to review the numerous authorities on this question. The rule is now well settled by repeated decisions both of the state and federal courts, which have followed and applied the principle laid down by Lord ELLENBOROUGH in *Taylor* v. *Plumer*, 3 Maule & S. 562. The leading cases in this country are here simply referred to: *Overseers of the Poor* v. *Bank*, 2 Grat. 544; *Whitley* v. *Foy*, 6 Jones, Eq. 34; *Thompson* v. *Perkins*, 3 Mason, 232; *Kip* v. *Bank*, 10 Johns. 63; *Van Alen* v. *Bank*, 52 N. Y. 1; *Bank* v. *King*, 57 Pa. St. 202; *Cook* v. *Tullis*, 18 Wall. 332; *Schuler* v. *Bank*, 27 Fed. Rep. 424; *Bank* v. *Insurance Co.*, 104 U. S. 54; *Winters* v. *Armstrong*, and *Montgomery Nat. Bank* v. *Armstrong*, heretofore decided by this court. Those authorities impose upon complainant the duty of tracing the funds it seeks to have impressed with a trust character into the defendant's possession, either in their original or in some substituted form, and the burden of identification is imposed upon all owners seeking to follow their property or its proceeds. No well-considered case has gone to the extent of holding that, when an agent converts or misappropriates his principal's property or funds, and thereafter fails, his general estate will be impressed with a trust for the reimbursement of such principal, on the ground that such estate has been benefited, and to an equal amount, by the agent's breach of duty. Every creditor could rest a like claim to priority of satisfaction on the same ground. The right of the owner to follow and recover his property rests upon a principle altogether different. In the present case the complainant, upon the doctrine of the cases cited, can only recover from the defendant such portions of the proceeds of its paper as it can trace into the hands of the receiver, either in their original or in some substituted form. The Fidelity National Bank having debit and credit balances with its numerous subagents or correspondents, who made the actual collection of complainant's paper, this court, upon the preliminary hearing of the cause, directed a reference to a special master to ascertain and report what funds derived from complainant's paper had come into the defendant's possession as receiver. The special master made his first report in the premises, which showed that complainant's said funds were mostly collected by subagents of the Fidelity Bank; that such subagents, having mutual accounts with the Fidelity National

Bank, credited the latter with the amount of such collection, and that at the date of the Fidelity Bank's suspension it had credit balances with some and debit balances with other of such subagents. This still left the fact sought to be ascertained in some doubt, and the court thereupon directed the special master to make an amended and supplemental report, and show what portion of the paper transmitted by complainant to the Fidelity National Bank between the 4th and 20th June, inclusive, was collected by correspondents of said Fidelity Bank, and credited to the latter, and in what cases the accounts between said Fidelity Bank and said correspondents exhibited a continuous balance due the former from the latter down to the date of the Fidelity Bank's failure, as large or larger than the amount of the proceeds of complainant's said paper so collected and credited by said correspondents, respectively, to said Fidelity Bank, and in what instances, and to what amounts, such balances so due from said correspondents at the time of the Fidelity Bank's suspension were subsequently paid over to and received by the defendant. The special master filed his amended report on the 27th of May, 1889, showing that the defendant had, subsequent to the suspension of the Fidelity Bank, received from said correspondents the proceeds of complainant's said paper to the amount of $7,209.59. Under the authorities the complainant could have reached and subjected those credits in the hands of said correspondents, which were made up by the proceeds of its paper. It can still follow the same in the hands of the defendant, to whose possession the funds belonging to complainant are thus clearly traced to the extent of $7,209.59.

Various exceptions are taken to the master's original and amended reports. They need not be noticed or considered in detail. In the judgment of the court the findings and conclusions of the special master are clearly sustained by the evidence, and the exceptions are overruled, and said amended report of May 27, 1889, is found to be correct, and is confirmed. A decree will be accordingly entered for complainant, directing the defendant to pay over to it or its counsel of record said sum of $7,209.59, and such dividend as he may hereafter receive on the sum of $1,577.89, collected by the Fifth National Bank of St. Louis on complainant's said paper, and credited to the Fidelity Bank. Each party will pay half the costs herein, including the fee of the special master, which is fixed by the court at the sum of $150.

MARTIN *v.* HOUSE *et al.*

(Circuit Court, E. D. Arkansas. June, 1888.)

UNITED STATES—PUBLIC LANDS—JURISDICTION.

Where land has been sold to the United States government, and jurisdiction over the same has been ceded to it by the state legislature, reserving the right to serve personal process thereon, no process issuing out of a state court upon a judgment lien to which the land was subject at the time of sale can affect the title thereto.

At Law. Action to recover land.

N. M. & G. B. Rose and *J. W. Martin*, for plaintiff.

J. W. House, for defendants.

BREWER, J. This is an action brought to recover possession of the south half of block 98, in the city of Little Rock, the same being the ground on which is situated the post-office building. Under the practice which obtains in this state, exceptions were filed to the deeds and other documentary evidence exhibited by plaintiff, and relied on as evidences of title. One matter only shall I notice, for that is fatal to plaintiff's right to recover.

On the 15th of May, 1874, one M. W. Benjamin, who had theretofore been the owner of the property, made a final conveyance to the United States. On the 4th of April, 1874, J. W. Martin recovered a judgment in the Pulaski circuit court against said Benjamin. Execution was issued on that judgment in March, 1875, this property levied on and sold to plaintiff. On June 7, 1872, the congress of the United States passed an act as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the secretary of the treasury be, and he is hereby, authorized and directed to purchase a site for, and cause to be constructed, a suitable building, with a fire-proof vault extending to each story, at the city of Little Rock, in the state of Arkansas, for the accommodation of the United States circuit and district courts, post-office, internal revenue, and other government offices, and for this purpose there is hereby appropriated out of any money in the treasury not otherwise appropriated the sum of one hundred thousand dollars, to be expended under the direction of the secretary of the treasury, who shall cause proper plans and estimates to be made, so that no expenditure shall be made or authorized for the full completion of said building and payment for the site thereof beyond the amount herein appropriated: provided, that no part of the sum herein appropriated shall be used or expended until a valid title to the site of said building shall be vested in the United States, and until the state of Arkansas shall duly release and relinquish its jurisdiction over the same, and its right to tax said site, and the property which may be thereon, during the time the United States shall be or remain the owner thereof. Approved June 7, 1872."

The legislature of Arkansas, on the 21st day of February, 1873, passed the following act, to-wit:

"The state of Arkansas hereby consents to the purchase by the United States of a site for public buildings, * * * and hereby cedes and grants

jurisdiction to the United States over any lot or lots, parcel, or block of ground within the corporate limits of the city of Little Rock, not exceeding in area three hundred (300) feet square, which shall or may be purchased by the United States as a site for a building for the accommodation of the United States circuit and district courts, post-office, internal revenue, and other government offices, under the act of congress approved June 7, 1872; and the said state hereby releases and relinquishes her right to tax said site, and all improvements which may be thereon, during the time the United States shall be and remain the owner thereof: provided, that this grant of jurisdiction shall not prevent the execution of any process of this state, civil or criminal, on any person who may be on said premises."

The effect of these two acts was to vest exclusive jurisdiction over this tract of ground in the United States government, and this by virtue of section 8, art. 1, of the United States constitution. Now, at the time the cession of jurisdiction became operative and final, to-wit, on May 15, 1874, the government received a good title, as well as exclusive jurisdiction. True, the property was subject to a judgment lien, and, if the property had remained in the territorial jurisdiction of the state of Arkansas, this judgment lien might have ripened, through proceedings in the state courts, into a perfect title; but after the cession of jurisdiction the power of the Arkansas state courts over the property ceased. No process could issue out of any state court to disturb the title or affect the property. I do not mean to say that the cession of jurisdiction would destroy the lien, but it did compel the enforcement of any rights which the judgment creditor had by proceedings in the federal courts. The reservation as to service of process is as expressed to process which is purely personal, and therefore, *ex vi termini*, excludes process, mesne or final, touching property, real or personal. This seems to be the general *consensus* of opinion, as expressed in the various cases cited by the learned district attorney in his brief. The most authoritative case cited by him is that of Railroad Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. Rep. 995, from which I make this quotation:

"When the title is acquired by purchase, by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the constitution that congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of the attorneys general. The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them, but is admitted to prevent them from becoming an asylum for fugitives from justice; and congress, by statute passed in 1795, declared that cessions from the states of the jurisdiction of places where light-houses, beacons, buoys, or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and, if no such reservation had been made, or in future cessions for those purposes should be omitted, civil and criminal process, issued under the authority of the state or of the United States, might be served and executed within them. 1 St. 426, c. 40."

Several other cases are noticed by the court in subsequent portions of the opinion. In view of the decision of the supreme court in that case, further discussion by me would seem superfluous. The exceptions will be sustained.

UNITED STATES *v.* CUDDY.

(*District Court, S. D. California.* August 26, 1889.)

PERJURY—INDICTMENT.

An indictment for perjury which charges that defendant took an oath before Judge R. in the United States district court, in open court, which oath was administered by the duly-authorized clerk, who had authority to administer the oath, in a matter then pending, that he would tell the truth, and that he did willfully and corruptly swear to material matter which is set out in the indictment, is sufficient under Rev. St. U. S. § 5392, declaring such a person swearing to any material matter which he does not believe to be true to be guilty of perjury, and section 5396, providing that it shall be sufficient to set forth the substance of the offense charged, and by what court, and before whom the oath was taken, with proper averments to falsify the matter wherein the perjury is assigned.

On indictment for perjury.

A. W. Hutton, U. S. Atty.

Ross, J. The question in this case is as to the the sufficiency of the indictment, which charges that defendant, at a certain time and place, within the jurisdiction of this court—

"After having taken an oath before the Honorable E. M. Ross, judge of said court,—which oath was administered to the said Cuddy in open court on said day by E. H. Owen, the duly-appointed, qualified, and acting clerk of said court, he, the said Owen, as such, being then and there a person having competent authority to administer said oath,—that in the matter then and there pending, entitled 'In the Matter of the Contempt of Thomas J. Cuddy,' he would tell the truth, the whole truth, and nothing but the truth, then and there willfully, falsely, corruptly, and contrary to such oath, did state certain material matter in his testimony then and there adduced, in open court as aforesaid, at the time and in the manner aforesaid, being in words and substance as follows, to-wit: 'I didn't know that Mr. McGarvin, or any other gentleman in particular, would be called on this occasion. (Meaning the trial of the case of the United States vs. W. More Young, which was a criminal cause pending against the said Young in the said court, and set for trial for February 12, 1889.) I never dreamed that he was to be a juryman, and don't now. (Meaning a juror in the cause last-above named.) I didn't know Mr. McGarvin was a juror. Didn't know anything about it. Didn't give the matter a thought. (Meaning that he, the said Cuddy, didn't know that the said McGarvin was a petit, to-wit, a term-trial, juror in said court at the time and at the place first above named.) I had no idea that Mr. McGarvin was one of them at this time. I didn't know anything about it.' (Meaning, by the words 'one of them,' one of the term-trial jurors duly impaneled and sworn in the said court, as aforesaid.) Whereas, in truth and in fact, the said Thomas J. Cuddy did know that the said Robert McGarvin was a petit, to-wit, a term-

trial, juror duly impaneled and sworn in said court, at all the times hereinbefore recited; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Thomas J. Cuddy, on the said 13th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, in the said city of Los Angeles, county and state and district aforesaid, in the United States district court within and for the district of California, in open court as aforesaid, before the said E. H. Owen, being then and there a competent person to administer said oath, the laws of the United States authorizing said oath to be administered in said matter, by the said Thomas J. Cuddy's own act and consent, in manner and form as aforesaid, did commit willful and corrupt perjury."

The United States statute defining perjury is as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished" in a prescribed way. Rev. St. § 5392.

And section 5396 of the Revised Statutes provides that—

"In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

The last section is in substance the same as the enactment of 23 Geo. II. c. 11, which was designed to do away with the needless prolixity and precision required by the statute of 5 Eliz. c. 9, which oftentimes resulted in the escape of those guilty of the crime of perjury. The averments in a case of this character are, as said by Mr. Bishop, necessarily of two classes,—those which disclose a foundation for the commission of the offense commonly called inducement, and those which charge the offense itself. The latter, being that whereof the defendant is accused, must be direct and specific; but the former may be charged in general terms. 2 Bish. Crim. Proc. § 901 *et seq.* But, while the matter of inducement may be generally stated, the allegations respecting it must be sufficient to show that the oath was taken before a competent tribunal, officer, or person, and in a case in which the laws of the United States authorizes the oath to be taken. Where, as in the present case, the false swearing is alleged to have been committed in a matter or proceeding in open court, the allegations must be sufficient to show that the matter or proceeding was one in which the court was competent to act. To hold otherwise would be to hold that false swearing, in a matter or proceeding of which the court had no jurisdiction, constitutes perjury, which cannot be affirmed. 2 Bish. Crim. Law, § 1020; 2 Whart. Crim. Law, § 1288

et seq.; 2 Bish. Crim. Proc. §§ 905, 910, and numerous cases cited in the note to the case of *State* v. *Shupe*, 85 Amer Dec. 485.

Now, looking at the indictment, it is seen that it charges that at a certain named time and place, within the jurisdiction of this court, the defendant took an oath in the United States district court—which oath was administered to him in open court by E. H. Owen, the duly-appointed, qualified, and acting clerk of said court, and who was then possessed of competent authority to administer it—that in the matter then pending in said court entitled "In the Matter of the Contempt of Thomas J. Cuddy," he would tell the truth, the whole truth, and nothing but the truth, then and there willfully, falsely, corruptly, and contrary to such oath, did state certain material matter in his testimony then and there adduced, which is specifically set out in the indictment. The materiality of the testimony is sufficiently alleged, and the allegation falsifying the alleged material matter is also sufficient. I see no force in the suggestion that there is no allegation that defendant swore falsely to a material matter which he did not believe to be true. The allegation is that he willfully and corruptly swore to material matter which he knew to be false. He could not believe to be true that which he knew to be false. If there was nothing further in the indictment to show that the matter in which the alleged false swearing was committed, was one of which the court had jurisdiction, than the allegation that the alleged false testimony was given in a matter then pending in the district court, entitled "In the Matter of the Contempt of Thomas J. Cuddy," I would be inclined to think the indictment fatally defective; but the indictment does further aver that the laws of the United States authorized said oath to be administered in said matter. Since all of this, as has been seen, is matter of inducement, and may be stated generally, and since the court must have jurisdiction over a matter pending therein in which the laws of the United States authorizes an oath to be administered, I am of opinion that the indictment does sufficiently show that the court had jurisdiction of the matter in which the perjury is alleged to have been committed. Demurrer overruled.

Sun Vapor Street Light Co. *v.* City of Cedar Rapids.

(*Circuit Court, N. D. Iowa, E. D.* August 22, 1889.)

Infringement of Patents for Inventions—Pleading.

Complainant alleged that it was the owner of certain letters patent for improvements in supplying street lamps with oil, and that defendant city, in violation of these patents, was using street lamps with these improvements, and asked an injunction and accounting. Defendant in its answer, among other matters, set out an agreement with a third party to furnish the lamps, and to light and extinguish the same, for a fixed sum. *Held*, that this portion of the answer was pertinent to the issue, and, though it might not constitute a bar, should be considered in determining the relief to be granted.

In Equity. Bill to restrain infringement of letters patent.

Charles R. Miller, for complainant.
J. N. Whittam, for defendant.

SHIRAS, J. The bill filed in this cause charges that the complainant corporation is the owner, by assignment, of letters patent No. 222,856, issued to Henry S. Belden for an improvement in the "method and means of supplying street lamps with oil," and of letters patent No. 286,211, issued to Alfred L. Mack for an improvement in a "reservoir for burning fluids;" that the defendant corporation, in violation of complainant's rights, and in infringement of said letters patent, has caused to be made, and has in use upon the streets of said city of Cedar Rapids, a number of street lamps which in their construction embrace the improvements secured by said letters patent; that the defendant has been and is making, by the use of such lamps, large gains and profits, for which an accounting is prayed.

In the answer filed the defendant sets forth that there is in use upon its streets 175 gasoline lamps; that these lamps, and the posts upon which the lamps are placed, are owned by the Western Street Light Company; that by a written contract, set forth in full, between said defendant and said Western Street Light Company, the latter agrees to furnish said lamps and posts, to keep the same in good order, and to light and extinguish the same, for a certain sum per lamp, payable annually by the defendant. To so much of the answer as sets forth the agreement with the Western Street Light Company complainant excepts, upon the ground that the facts thus set forth do not meet the charge of infringement in the bill; that, if the lamps furnished under this written contract do in fact infringe upon the patents owned by complainants, the defendant is a participant in the wrong, and cannot evade responsibility for its acts by showing that the lamps are owned and furnished by another party.

Granting this to be true, still it does not follow that the exceptions should be sustained. The bill charges that the defendant has caused to be made, and is using upon its streets, a large number of lamps which infringe upon the patents owned by complainant, and that it is making large profits therefrom, of which discovery is prayed. In response to this demand the answer sets forth the facts touching the agreement with the Western Light Company, the ownership of the posts and lamps, and the price paid for the use thereof. In other words, discovery is made of the relation of the city to the lamps, of the interest of the city therein, and the price paid therefor. These are matters pertinent to the issues, and which must be considered in determining the relief to be granted, in case a decree goes for complainant. The fact that they may not constitute a bar to complainant's right of recovery does not render them immaterial, and they are properly set forth in the answer in response to complainant's demand for a discovery of the use made by defendant of lamps infringing upon the patents declared on, and of the profits derived therefrom. Exceptions are overruled.

BALL & SOCKET FASTENER CO. *v.* KRAETZER.

(*Circuit Court, D. Massachusetts* September 18, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—GLOVE-FASTENERS.
In letters patent No. 325,688, issued September 8, 1885, to Albert G. Mead for a metallic glove-fastener, the button-hole member of the device consists of "a hollow socket in combination with a rivet and button-head, whereby it is centrally attached to the fabric," the spring action being secured in the expansive socket. The button-head and socket features were known in the art, prior to the patent. *Held*, that such invention was confined to the form of the socket combined with an imperforated button-head, and was not infringed by letters patent issued to Edwin J. Kraetzer, the button-hole member of whose device consists of a socket with a tubular extension passing through the fabric and attached on the other side with a button-head, and a spring in the form of a split wire, capable of expansion and resting loosely in such socket.
2. SAME—CONSTRUCTION.
A patent cannot be held to embrace a device which was not mentioned by the patentee as a part of his invention, and which is not clearly shown to be a novelty and a substantial improvement.

In Equity. Bill for infringement of patents.
T. W. Clarke and *F. P. Fish*, for complainant.
J. R. Bennett and *W. B. H. Dowse*, for defendant.

COLT, J. This bill, as originally filed, alleged that the defendant infringed six letters patent. Five of these patents were granted to William S. Richardson, and numbered, respectively, 260,050, 300,508, 300,509, 300,510, 325,699, and one to Albert G. Mead, September 8, 1885, and numbered 325,688. Subsequently the complainant discontinued his suit as to Richardson's patents Nos. 260,050 and 325,699. The devices shown in these patents relate to metallic glove-fasteners, the general features of which consist in a button member attached to one flap of the garment, and a resilient button-hole member attached to the other flap. The defendant's fastener is called the "Kraetzer Fastener," and is made under certain patents issued to him. In the present suit we are only concerned with the button-hole member of the fastener. The spring which engages the button member of the Kraetzer fastener is a ring of wire split on one side so as to be capable of expansion. This spring ring is held loosely in a chamber composed of two pieces of metal, united around their edges, one of which has a tubular extension which passes through the fabric, and is engaged with the cap or button-head on the other side of the fabric. The spring chamber is on the under side of the fabric and the button-head or cap on the upper side, and the two are fastened together so as to hold the fabric between them by the upsetting of the tubular neck of the spring chamber on the upper side of the central opening of the cap. It is contended that when the spring action of the button-hole member is the socket itself, it is easily impaired, whereas the spring ring of the Kraetzer fastener rests loosely in the chamber, and that this enables it to be made of the best elastic material. I do not find the Kraetzer device in any of

the Richardson patents relied upon by the complainant. Indeed, from the admission of complainant's counsel, it may be said that the only serious question in this case relates to the Mead patent. It is strongly urged that the Kraetzer fastener infringes claims 6 and 7 of the Mead patent, which are as follows:

"(6) A member of a fastening device consisting of a hollow socket in combination with a rivet and button-head, whereby it is centrally attached to the fabric, substantially as set forth. (7) A member of a fastening device composed of a hollow socket, D, centrally attached to an eyelet, *l*, the latter resting upon and within an annular depression, *q*, formed in a concave collet or disk, E, substantially for purposes herein set forth."

In his specification Mead says:

"I consider my present invention embraces, first, the method of centrally securing the socket portion of the fastening to the article, whereby the open part or socket of said member is disposed upon the under side of the flap and secured by a rivet extending through the fabric. Thus, in permanently securing it to the latter, a suitable button-head or cap is employed upon the upper surface of the flap, and can be so formed and constructed as to form a button finish, a result much desired, since it gives the article an appearance exactly similar to an ordinary button, which is the most neat and tasty finish that can be employed in the class of articles of apparel to which such fastenings are usually attached; but, further, the whole device is thereby concealed and prevented from becoming caught and broken."

The socket of Mead is composed of a cup-shaped washer with curved wings. It is applied to the interior of the glove-flap, and it is secured to the exterior washer or button-head by a central rivet passing through a hole in the glove-flap. I do not understand that it is contended that either the cap or cup-shaped socket of Mead is new, or that an elastic mouth situated upon the under side of the flap, and secured by a button-head at the other side of the flap, was not known in the art prior to the Mead patent. The invention of Mead, it seems to me, must be limited to his form of socket combined with an imperforated button-head. The Kraetzer device does not contain the Mead socket, and therefore does not infringe the Mead patent.

The complainant seeks to extend what appears to me to be the legitimate scope of the Mead patent upon the theory that the spring-mouthed socket of Mead presses the leather upward into the button, and squeezes the leather against the inner surface of the button; that this feature, in connection with the fact that the hole in the flap need not be any larger than the diameter of the rivet, introduces an important element of strength which is found for the first time in the Mead device. There are several reasons why this theory does not impress me with the importance with which it does the complainant. In the first place, I am not satisfied upon the evidence that there is any great advantage in pressing the fabric up into the button head; in the second place, I think this feature was present in the prior Dowler English patent, although it is not exhibited in the drawings; and, thirdly, Mead himself does not seem to consider this feature of sufficient consequence to claim it as a part of his invention. Before the court should give such a broad construction to the Mead patent

as to include something not mentioned by the patentee as a part of his invention it should certainly clearly appear that the improvement was a substantial one, and that it is not found in any prior device. In this case I do not think the complainant has made out the charge of infringement, and it follows that the bill should be dismissed. Bill dismissed.

SIMONDS COUNTER MACHINERY CO. *v.* KNOX *et al.*

(*Circuit Court, D. Massachusetts.* August 31, 1889.)

1. JUDGMENT—RES ADJUDICATA.
In a third suit on letters patent, which have been assailed as invalid on account of prior public use, and have been twice sustained by the courts, the former decision will be followed where no new facts of a controlling character are introduced.

2. PATENTS FOR INVENTIONS—INFRINGEMENT.
Letters patent No. 147,288, dated February 10, 1874, and granted to Simonds and Emery for improvements in machinery for moulding counters for boots and shoes, claimed a combination of a divided mould and cams, which moulded the heel-counter by a pressure nearly at right angles to the surface of the leather. *Held* infringed by a machine made under a patent granted November 6, 1888, to G. A. Knox, by which the counter is pressed into shape by pressure nearly at right angles, by a spring-mould which is not divided, but is substantially the same as that of Simonds and Emery.

In Equity. Bill to enjoin infringement of patent.

W. A. Macleod, for complainant.

Livermore, Fish & Richardson, for defendants.

COLT, J. This suit is brought on letters patent No. 147,288, dated February 10, 1874, granted to Simonds and Emery for improvements in machinery for moulding counters for boots and shoes. The present hearing was upon motion for a preliminary injunction. The patent has been twice passed upon by the circuit court. In the suit of *Emery* v. *Cavanagh*, 17 Fed. Rep. 242, 27 Fed. Rep. 511, Judge SHIPMAN held that the patent was valid. The main ground of attack in that case was public use for more than two years prior to the application for a patent, and the court, upon examination of the evidence, found that the prior use of the machine was experimental. Subsequently suit was brought in this circuit by the present complainant against Lewis B. Russell, raising the same issues as in the *Cavanagh Case*, and Judge LOWELL, after hearing the arguments of counsel, and upon consideration of the case, granted an injunction *nisi*. In the present case, and for the third time, it is sought to invalidate this patent on the same ground of prior public use. The question raised under this issue is one of fact, and consequently the evidence is conflicting; and, where the circuit court has twice found for the patentees on this issue, the court should hesitate to reverse such finding, unless upon new evidence of a decisive and con-

trolling character. The evidence before the court in the prior suits is made a part of the present record, and, while the defendants have called several additional witnesses to this point, still, taking the evidence as a whole, it is substantially the same as in the other suits; at least no new facts of a controlling character have been brought forward by the defendants. I shall therefore follow the prior decisions of the court, and hold the patent valid.

It is suggested by defendants' counsel, in a careful review of the authorities, that the law on the question of what constitutes "public use" has been modified by the supreme court in the recent case of *Smith & Griggs Manuf'g Co.* v. *Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122, and that under the rule there laid down the patent in suit is shown to be invalid. I do not understand, however, that the *Smith & Griggs Case* changed the doctrine of the law with reference to prior public use, or that it is in conflict with the former decisions of the same court on this point.

The second and remaining defense is non-infringement. Simonds and Emery appear to have been the first persons to set a heel-counter or stiffener for boots and shoes firmly into shape. In prior devices the moulding pressure at the open ends of the counter was exerted by the female die sliding along the leather. Simonds and Emery were the first to mould this part of the counter by a pressure nearly at right angles to the surface of the leather, by means of a divided die whose open ends approach each other and set the leather into the proper shape. The alleged infringing machine is made under a patent granted to George A. Knox, November 6, 1888. In this machine there is a spring-mould so formed that its open ends approach each other by means of cams, and compress the counter at nearly right angles to its surface. The Knox spring-mould is not divided, but in structure and operation it seems to me substantially the same, or the equivalent, of the Simonds and Emery, with the exception of the flange-turning device which is found in the latter. In the Knox machine the turning of the flange of the counter is performed by other mechanism. I am of opinion that there is found in the Knox machine the combinations described in claims 1 and 4 of the Simonds and Emery patent. These claims are as follows:

"(1) The combination of the divided mould, *i*, *i*, and form, *n*, substantially as described and shown."

"(4) In combination with mould, *i*, *i*, the cams, *a'*, *a'*, substantially as described and shown."

In view of the advance made in the art by Simonds and Emery, and of prior adjudications, these claims should receive a fairly liberal construction. The prior patents upon machines for making horseshoes do not, I think, anticipate this invention. Motion granted.

PRINCE STEAM-SHIPPING CO. *v.* LEHMAN *et al.*[1]

(*District Court, S. D. New York.* September 4, 1889.)

1. SHIPPING—CHARTER-PARTY—PUBLIC POLICY.
A stipulation in a charter-party that "all disputes * * * arising on this charter-party, or on bills of lading signed thereunder, shall be settled at port of discharge only," is contrary to public policy, and void.
2. ADMIRALTY—PLEADING.
A hearing on an exception to a libel must be determined on the pleadings, and an affidavit on behalf of respondents cannot be considered.

In Admiralty. On exceptions to libel.
Butler, Stillman & Hubbard, for libelant.
R. D. Benedict, for respondents.

BENEDICT, J. This case comes before the court upon an exception to the libel. The suit is brought *in personam* against the respondents upon a charter-party, to recover freight money. A copy of the charter-party is annexed to the libel. The respondents served a general notice of appearance, and then excepted to the libel. The exception raises but one question, and that is whether this court has jurisdiction to entertain the action in view of a provision in the charter-party, set forth in the libel, which is as follows:

"It is further agreed that all disputes, if any, whether arising before or after shipment of cargo, and whether arising on this charter-party or on bills of lading signed thereunder, shall be settled at port of discharge only."

The libel shows Philadelphia to be the port of discharge.

The provision in the charter-party, upon which the respondents rely, is in legal effect an agreement ousting the jurisdiction of all courts, except those in the port of Philadelphia. Such agreements have repeatedly been held to be against public policy, and void. The provision being void, it makes no difference which party seeks to take advantage of it; being void, it is of no avail to either party. The exceptions must therefore be overruled.

An affidavit submitted on behalf of the respondents cannot be regarded. This is not the hearing of a motion to decline jurisdiction, addressed to the discretion of the court, but the hearing of an exception to the libel, and must be decided on the pleadings. Moreover, a motion to decline jurisdiction, addressed to the discretion of the court, based upon such a stipulation, could not prevail.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.